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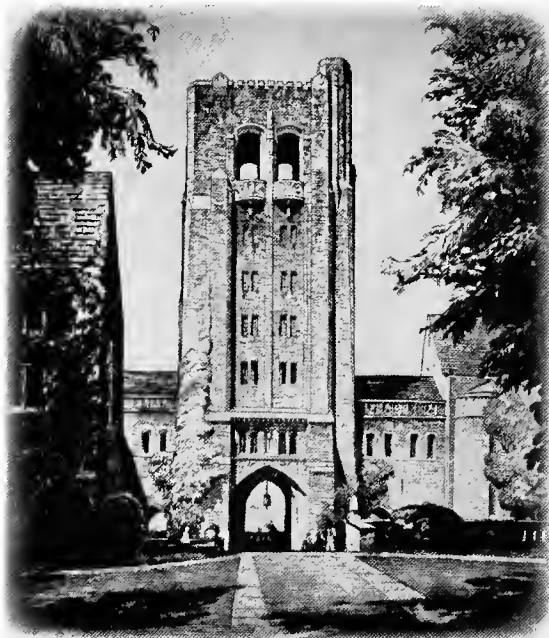
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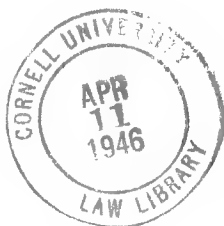
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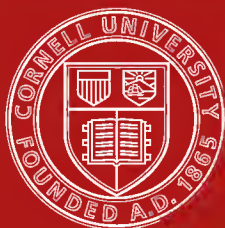
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LECTURES
ON
EQUITY PLEADING *and* PRACTICE
WITH FORMS
AND
The New Federal Equity Rules

Prepared for the use of the students of the Law School
of the University of Virginia

BY
W. M. LILE
Professor of Law



UNIVERSITY OF VIRGINIA
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Preface

This small volume is largely the result of many years of effort to collect the fundamental principles of the Equity Pleading and Practice for the use of the author's students in class-room instruction. The topic is one that can successfully be taught to students only by confining the instruction largely to the procedure of some particular jurisdiction. Numerous attempts to use the larger well-known texts in the class-room have proved hopeless failures. The author has therefore drawn very largely upon the system of procedure as it exists in Virginia, where the procedure at law and in equity is still as distinct as when Lord Bacon occupied the woolsack—and where the equity procedure probably conforms more nearly to that of Bacon's day than that of any American state.

In the treatment of the subject of Receivers, free use has been made of Mr. High's scholarly treatise, for which due acknowledgment is made.

If, in so elementary a work, the subject of Receiverships seems overstressed in comparison with the briefer treatment of other topics of equal or greater importance, the explanation is that it was found impracticable to handle the subject in less compass, even in most elementary fashion.

Detailed reference is made throughout to the new Federal Equity Rules—and these rules have been reproduced in full in the Appendix.

It is hoped that the complete record of a chancery suit, as exhibited in the Appendix, may assist the student in visualizing the actual procedure in court, and in cultivating a closer acquaintance with those forms which he is expected as a practitioner to have at his fingers' ends.

In order to fulfill its primary end as a guide to the student through what seems to the average undergraduate a dull and uninviting territory, the value of the work to the experienced practitioner has been sacrificed, by the omission of many minute points of practice.

W. M. L.

University of Virginia,
May 1, 1916.

Table of Contents

CHAPTER I.
PRELIMINARY.

CHAPTER II.
JURISDICTION.

CHAPTER III.
VENUE OF SUITS.

CHAPTER IV.
PROCESS TO COMMENCE SUIT.

CHAPTER V.
PROCEEDINGS IN THE CLERK'S OFFICE.

CHAPTER VI.
PARTIES.

CHAPTER VII.
OUTLINE OF THE PLEADINGS.

CHAPTER VIII.
MULTIFARIOUSNESS.

CHAPTER IX.
THE BILL.

CHAPTER X.
THE ORIGINAL BILL IN DETAIL.

CHAPTER XI.
ORIGINAL BILLS NOT PRAYING RELIEF.

CHAPTER XII.
BILLS NOT ORIGINAL.

CHAPTER XIII.
BILLS NOT ORIGINAL—CONTINUED.

CHAPTER XIV.
THE DEMURRER.

CHAPTER XV.
THE PLEA.

CHAPTER XVI.
THE ANSWER.

CHAPTER XVII.
THE REPLICATION.

CHAPTER XVIII.
THE TESTIMONY.

CHAPTER XIX.
CONSOLIDATION OF CAUSES.

CHAPTER XX.
MISCELLANEOUS PROCEEDINGS.

CHAPTER XXI.

ORDERS AND DECREES.

CHAPTER XXII.

THE MASTER'S REPORT.

CHAPTER XXIII.

JUDICIAL SALES.

CHAPTER XXIV.

ENFORCEMENT OF DECREES.

CHAPTER XXV.

SPECIAL ANCILLARY PROCEEDINGS.

CHAPTER XXVI.

SPECIAL INSTANCES OF SUITS FOR RELIEF.

CHAPTER XXVII.

INJUNCTION SUITS.

CHAPTER XXVIII.

SUITS FOR PARTITION.

CHAPTER XXIX.

SUITS FOR DIVORCE.

CHAPTER XXX.

SALE OF LANDS OF PERSONS UNDER DISABILITY.

CHAPTER XXXI.

CREDITORS' SUITS.

CHAPTER XXXII.
APPOINTMENT OF RECEIVERS.

CHAPTER XXXIII.
RECEIVERS—CONTINUED.

APPENDIX I.

1. THE COMPLETE RECORD OF A SUIT FOR SPECIFIC PERFORMANCE.
 2. SUNDRY FORMS.
-

APPENDIX II.
THE NEW FEDERAL EQUITY RULES.

Lectures on Equity Pleading and Practice

CHAPTER I.

PRELIMINARY.

I. Equity Courts.

§ 1. **Jurisdiction statutory.**—The judicial system of each state of the Union is fixed by local legislation.

The Federal system depends on the constitution and laws of the United States.

§ 2. **Equity courts in Virginia.**—The equity or chancery jurisdiction in Virginia is vested in the circuit and corporation courts of the different counties and cities, with special provisions made for the cities of Richmond and Norfolk.¹

§ 3. **Federal courts of equity.**—In the Federal system, the original equity jurisdiction was from the beginning vested in the United States Circuit courts, until by a quite recent statute the Circuit courts were abolished, and all original jurisdiction, both at law and in equity, was vested in the District courts—courts which had formerly possessed no general equity jurisdiction.

§ 4. **The Virginia and Federal judicial systems—continued.**—In neither the Virginia nor the Federal system are there separate courts for the administration of the equity jurisdiction, as distinguished from the jurisdiction at law. But the courts named in the preceding section possess general jurisdiction both at law and in equity. Although the two jurisdictions are thus administered by the same courts, equity suits are instituted and conducted according to the equity practice, and law suits according to the practice at law. The records are kept

1. Va. Code, §§ 3051, 3055, 3058.

distinct, and there is no further mingling of the two systems than in the administration of both by the same judicial machinery.

For a knowledge of the judicial systems of other states, reference must be had to their local legislation.

II. The pleading and practice in equity courts.

§ 5. Equity pleading and practice in Virginia.—In Virginia, the procedure in courts of chancery is based on that prevailing in the High Court of Chancery in England at the time the colonies declared their independence, as modified by statute, or by departures here and there which have become established by long custom and judicial sanction.

§ 6. The same—in the Federal courts—old equity rules.—Up to February 1, 1913, when radical alterations were made in the equity practice, the procedure in the Federal courts of equity probably conformed more nearly to that formerly prevailing in the English High Court of Chancery than does the procedure in the Virginia courts. This procedure was to a large extent, regulated by what is known as the *Federal Equity Rules*, promulgated from time to time by the United States Supreme Court for the regulation of procedure generally in all Federal courts of equity. In most respects, these rules were largely declaratory of the existing practice.

§ 7. The same—new Equity Rules.—In response to a very general demand for reform in the equity procedure of the Federal courts, the Supreme Court of the United States on November 4, 1912 (effective February 1, 1913), promulgated a new code of equity procedure for the Federal courts, making extensive and radical alterations of the old procedure—all looking to economy and dispatch in the maturing, decision and final disposition of equity causes. These latter rules completely supersede the former Equity Rules.²

2. For a luminous discussion of the question whether the regulation of court procedure is a legislative or a judicial function, and as to the constitutionality of statutes delegating to the courts the promulgation of rules of practice and procedure, see 2 Am. Bar Ass. Journal, 46.

CHAPTER II.

JURISDICTION.

§ 8. **Jurisdiction—two senses.**—As the term jurisdiction is used in two different senses, it becomes important to distinguish these at the outset. Indeed, so marked is the distinction, that for our purpose we may classify jurisdiction as of two kinds—the one *potential*, and the other *active*, jurisdiction.

Later we shall consider another classification, from a different point of view, namely, jurisdiction *in personam* and *in rem*.

A. Potential and active jurisdiction.

§ 9. (1) **Potential jurisdiction—meaning.**—By potential jurisdiction is meant the power granted by the sovereignty creating the court to hear and determine controversies of a given character.

For example, the Virginia statute declares that the circuit courts of this state “shall have original and general jurisdiction of all cases in chancery and civil cases at law.”¹ Hence we may say that by virtue of this statute our circuit courts have *potential* jurisdiction, generally speaking, over every conceivable chancery cause, regardless of the residence of the parties or of the location of the subject-matter of the controversy.

§ 10. (2) **Active jurisdiction—meaning.**—In order that the court thus invested with potential jurisdiction may rightfully exercise that jurisdiction in a particular case, certain conditions of fact must appear—these conditions varying with the character or purpose of the proceeding. These conditions of fact may be demanded either by the settled principles of the unwritten law, or by the mandate of the statute law.

For example, it is a fundamental principle of all civilized jurisprudence that howsoever general the potential jurisdiction of

1. Va. Code, § 3058.

any court, before this jurisdiction may actually be exercised by proceeding to judgment, the parties to the controversy, or the subject-matter thereof, must be brought by proper proceedings (presently to be mentioned) within the judicial cognizance and control of the court. We may, therefore, define active jurisdiction as the *right to exercise the potential jurisdiction in a given case*. In other words, active jurisdiction connotes potential jurisdiction, plus such conditions of fact in the particular case, as are necessary to enable the court, under existing rules, to hear and determine that cause.

§ 11. Potential jurisdiction lacking.—It is a settled rule that where potential jurisdiction is lacking in a particular case, any judgment or decree rendered therein is *coram non judice* and void.

Thus, if the Hustings court of the city of Richmond (a court without general equity jurisdiction) should entertain a suit for specific performance of a contract, or should assume to enter a decree of divorce—or if the District court of the United States should assume jurisdiction of a controversy between two states (a jurisdiction vested exclusively in the United States Supreme Court)—any judgment or decree resulting from such usurped jurisdiction would be not only voidable but void.

§ 12. The same—not cured by waiver or consent.—It is an equally well settled rule that where, in order to hear and determine a given cause, the court must usurp a power not vested in it under the instrument of its creation, no waiver or consent of the parties, howsoever solemnly given, can affect the situation. The maxim here is “consent cannot confer jurisdiction.”²

§ 13. The same—how and when objection made.—Since there can be no waiver of the objection in such case, it follows that exception to the jurisdiction may be made by any party, at any stage of the proceeding, and in any form, oral or written, and even for the first time in the appellate court. It is equally true that even though no such objection be made, the court will

2. *Heigler v. Faulkner*, 127 U. S. 482.

of its own motion dismiss the suit whenever and at whatever stage of the proceedings the absence of jurisdiction comes to its attention.³ And further, any decree in such proceeding is subject to be collaterally assailed, whenever and wherever it may be brought in question.

§ 14. The same—equity exercising common law jurisdiction.—Notwithstanding the principle just announced that the decree of a court without potential jurisdiction is null and void, this result does not follow from the mere circumstance that a court of equity has erroneously exercised, in a particular case, jurisdiction in a cause properly cognizable only in a common law court. The proceedings would be erroneous, and liable to be set aside on appeal, but would not be void and subject to collateral attack.⁴

§ 14a. Action at law erroneously brought in Federal court of equity—transfer.—Provision is wisely made in the new Federal Equity Rules for transferring to the law side of the court a suit erroneously brought in equity and justiciable at law only.^{4a}

§ 15. Active jurisdiction—how acquired—waiver.—Where potential jurisdiction exists, active jurisdiction which, as we have just seen, is the right actually to exercise the judicial function of hearing and determining a particular cause, may be acquired in two ways: (1) By compulsory process of the court; and (2) by the voluntary submission of the parties.

Since the process of the court is not effective beyond the territorial limits of the sovereignty by which the court is created, it follows that if neither the defendant nor the subject-matter be within such limits, so as to become subject to the court's process, the court, though possessing full power to deal with controversies of that kind—in short, potential jurisdiction—is unable to exercise its grant of power, and consequently is without active juris-

3. *Green v. Massie*, 21 Gratt. 356.

4. 1 Pom. Eq. Jurisp. 131; *Lemmon v. Herbert*, 92 Va. 653; *Goodman v. Winter*, 64 Ala. 410.

4a. Equity Rule 22.

diction; and the cause must be dismissed, unless the defendant voluntarily submits himself to the jurisdiction.

Hence the methods of acquiring and exercising active jurisdiction, as prescribed by law, may, to a large extent, be modified or waived by the consent or voluntary appearance of the defendant, without in anywise affecting the powers of the court in the exercise of its potential jurisdiction. Consent may therefore, as a general rule, confer active but not potential jurisdiction.

The foregoing discussion of the general subject of jurisdiction enables us to reconcile the apparently conflicting principles constantly recurring in the books, namely, the rule that "consent cannot confer jurisdiction," and the rule that "objection to the jurisdiction must be pleaded in abatement, at any early stage of the proceeding." We shall see something more of the latter rule hereafter.

B. Jurisdiction in personam and in rem.

§ 16. (1) Jurisdiction in personam.—By this phrase is meant jurisdiction of the *person* of the defendant, as distinguished from the *thing* which constitutes the subject-matter of the controversy. We have already seen that active jurisdiction cannot be exercised unless one or the other of these is within the reach of the court's process; and that, in the absence of express restrictions, the process of every court of general jurisdiction is effective throughout the territorial limits of the state whose authority it exercises, but not beyond.

Thus, in the absence of express statutory restrictions, process from a Virginia court is effective throughout Virginia, but cannot be effective in any other state without the latter's consent; and no state is likely to consent to such an invasion of its sovereignty. Hence process from a Virginia court cannot operate as personal service when served on a defendant in another state. But when properly served on the defendant within the home state, the court acquires jurisdiction *in personam*. It is a fundamental principle that without such jurisdiction *in personam* no valid per-

sonal judgment or decree can be entered against any defendant. Such a proceeding would be without due process of law.⁵

§ 17. (2) Jurisdiction in rem.—Where jurisdiction of the person is thus lacking, but the *subject matter* of the litigation is within the state, and therefore subject to the process of the court, the court is then said to have jurisdiction *in rem*, or *quasi in rem*.

In order that this jurisdiction may be effectively exercised, it is essential to due process of law that the proceeding be primarily *in rem* or *quasi in rem*, and not merely against the defendant personally. Such a proceeding must be directed specifically against the *property itself*, with the purpose of having the *res* directly affected by the decree of the court.

Examples of such proceedings are: suits to enforce subsisting liens, such as mortgages, mechanics' liens or judgments; suits to remove clouds from title to property; suits to recover possession of property, or to establish or enforce a trust therein; attachment proceedings, etc.⁶

§ 18. The same—order of publication.—In cases such as these (i. e. *in rem*), where there can be no personal service by reason of the defendant's non-residence, the statutes of all the states permit citation of the defendant by publication of the summons in a prescribed newspaper, or (as in Virginia) by personal service in the foreign state.⁷

§ 19. Order of publication—effect of the decree.—It has long been settled that no personal judgment or decree can be had against a non-resident, or against any defendant beyond the territorial jurisdiction of the court, on summons served by publication, or personally served beyond the limits of the home state, unless the defendant voluntarily appears and submits to the jurisdiction. It is an equally settled principle that in a proceeding *in rem*, or *quasi in rem*, as described above, properly brought and conducted in accordance with the local statutes, the decree

5. *Pennoyer v. Neff*, 95 U. S. 714.

6. *Roller v. Holley*, 176 U. S. 398, and cases *infra*.

7. Va. Code, §§ 3230-3235.

will effectually bind the *res* against which the proceeding is, but no further.

It follows that if a non-resident owns property in Virginia encumbered by a mortgage or other lien, the creditor may enforce his lien against such property, on a summons by publication against the debtor. So, where there is no lien, but the creditor institutes proper attachment proceedings against his debtor's property within the jurisdiction, he may subject the attached property to his debt. But it is important to observe that the judgment or decree in such proceeding binds only the property actually proceeded against, and no other, and never the person of the defendant. The owner of property is presumed to be in possession of it, in person or by agent, and when such proceedings are taken against his property the defendant is presumed, for the purposes of that suit, *and so far (and so far only) as that particular property is concerned*, to have notice of the proceedings when summoned by order of publication.⁸

8. *Pennoyer v. Neff*, 95 U. S. 714; *Roller v. Holley*, 176 U. S. 398.

CHAPTER III.

VENUE, OR PLACE OF SUIT.

§ 20. **Venue statutory.**—The venue or place of suit, within a particular state, is always a matter of statute law.

In Virginia detailed provision is made with reference to the particular county or corporation in which suits may be brought.

§ 21. **Venue of chancery suits in Virginia.**—We cannot here go into the detailed provisions of the statute, but must be content with a bare outline. The statute provides that “any action at law or suit in equity,” except where it is otherwise specially provided, may be brought in any county or corporation:

(1) Wherein any of the defendants may reside.

(2) If a corporation be a defendant, (a) where its principal office is; or (b) wherein the mayor, rector, president or other chief officer resides.

(3) If it be to recover land, or to subject it to a debt, then the proceeding may be in the county or corporation wherein such land, or any part thereof, may be.

(4) Special provision is made for suits against insurance companies, foreign corporations, non-residents, and suits in which the commonwealth or certain public officers are parties defendant.

(5) It is further provided that an “*action*” may be brought in any county or corporation wherein the cause of action, or any part thereof, arose, although none of the defendants reside therein.¹

As § 3214 in express terms refers to “actions at law and suits in equity,” and as § 3215 is careful to refer to “actions” only, it is not entirely clear that suits in equity are within the purview of the latter section.²

1. Va. Code, 3214, 3215.

2. See 5 Va. Law Reg. 46; 2 Va. Law Reg. 476.

§ 22. **The same—provisions cumulative.**—It is important to observe that the several provisions of this statute are cumulative, and not exclusive of each other. For example, a suit to subject land to the lien of a judgment may be brought under provision (1) “where any of the defendants reside,” or under provision (3) “where the land may be.”³

§ 23. **Venue of injunction suits.**—Under Virginia Code § 3436, amended by Acts of 1902-3-4, p. 572, the venue of injunction suits depends somewhat upon the purpose of the injunction. (a) If the purpose be to enjoin a *judgment* or *judicial proceeding*, the suit must be brought in the court in which the judgment was rendered or such proceeding is pending—with certain exceptions. (b) Where the purpose is to enjoin *some other act or proceeding*, it is to be brought in the county or corporation where the act or proceeding is to be done, or is doing or apprehended.

These provisions refer to cases where the jurisdiction is asserted only for purposes of injunction—i. e. a *pure* bill of injunction. If the court have jurisdiction on other grounds, and the injunction is merely *ancillary* to the relief sought, then the suit may be brought in any of the localities mentioned in the foregoing section.⁴

§ 24. **The same—preliminary injunction.**—The jurisdiction thus fixed has reference not to the court that may grant the preliminary injunction *in limine*, but to the court which is finally to hear and determine the injunction proceedings. By another section of the Code, jurisdiction to award preliminary injunctions is conferred upon every judge of a circuit or corporation court in the state, regardless of the residence of the parties, or the locality of the proceedings or other thing sought to be enjoined.⁵

3. *Harrison v. Wissler*, 98 Va. 597; 6 Va. Law Reg. 471.

4. *Muller v. Bayly*, 21 Gratt. 521; 6 Va. Law Reg. 720; *Baker v. Briggs*, 99 Va. 360; Acts 1899-1900, p. 996. See *Bills for Injunction*, post, ch. xxvii.

5. Va. Code § 3437.

§ 25. Mistake in venue.—If suit be instituted in any county or corporation contrary to the foregoing regulations, the objection will be, in general, not that the court in which the suit is thus erroneously brought is without *jurisdiction*, but merely that the defendant is thereby deprived of the personal privilege of having the suit brought and tried in some other locality. This objection, then, goes rather to the *venue* than to the *jurisdiction*—or, otherwise expressed, the objection goes to the *active* and not to the *potential* jurisdiction. It is an objection, therefore, that may be waived, as already shown, and, as a general rule, is held to be waived unless the defendant pleads in abatement at an early stage of the proceeding.⁶

This is what is meant by the Virginia statute when it declares that “where the bill shows on its face proper matter for the jurisdiction of the court”—that is, if the case made in the bill be of the *kind* or *class* embraced within the potential jurisdiction of the court—“no exception for want of such jurisdiction shall be allowed unless it be taken in plea in abatement.”⁷

We have already seen that where potential jurisdiction is lacking this statute has no application, and objection may be made at any stage of the proceedings.

§ 26. Venue continued—in the Federal courts.—The particular locality in which suits in the Federal courts are to be brought is fixed by the Federal statutes. For the details of these statutory provisions, reference must be had to the statutes themselves.

For general purposes of venue, however, it may be said that the Federal Judicial Code distinguishes between cases in which the jurisdiction is based on the ground (1) of diverse citizenship,

6. *In re Moore*, 209 U. S. 490. A different principle applies where a *new right* is given by statute, and a *particular court* or a *limited venue* is prescribed for the enforcement of the right. Here the right and the remedy go together, and the question of *venue* becomes one of *jurisdiction*. *Pulaski County v. Stuart*, 28 Gratt. 872. Cf. *Coleman v. Virginia Stave Co.*, 1112 Va. 61, 75.

7. Va. Code § 3260; *Jones v. Bradshaw*, 16 Gratt. 355; annotation to § 3260, Pollard's Code.

and (2) not on grounds of diverse citizenship. In the former case (subject to numerous exceptions) the suit may be brought either in the district where the defendant resides or that in which the plaintiff resides. In the latter case the proper venue is the district in which the defendant resides.⁸

8. Judicial Code, § 51. For an instructive exposition see Prof. Dobie, *Venue in the United States District Court*, 2 Va. Law Review 1.

CHAPTER IV.

PROCESS TO COMMENCE THE SUIT.

§ 27. Process in equity courts—its nature.—In the common law courts the process to begin the action varies with the nature of the action. If this be debt, or *assumpsit*, or covenant, the process or writ is likewise in debt, *assumpsit*, or covenant.

In equity, however, the process is uniformly a *subpœna*, or summons, requiring the defendant to appear and make defense “to a bill in chancery filed against him,” with no further indication of the nature of the suit.¹

§ 28. The same—when issued.—Under the original equity practice the *subpœna* could be had only by filing the bill of complaint, in which was set forth the demands of the plaintiff, and in which was a prayer for the issuance of the writ.

In Virginia, while the writ *may* issue after the bill is filed, it is common practice, sanctioned by statute, to issue the process in advance of the filing of the bill—the latter being filed only at the return day of the process.²

In the Federal courts, the process cannot be had until after the filing of the bill.³

§ 29. The same—injunction suits.—Where preliminary action by the court is required, as in the case of applications for preliminary injunctions or appointment of receivers, of course the bill, even in Virginia, must be filed before such preliminary action can be had, since the court or judge could not grant the injunction, or take other preliminary action desired, without knowledge of the case made in the bill. And as the injunction order is usually endorsed on or attached to, and served along with, the *subpœna*, it follows that in such suits the bill is always filed before issuance of the process.

1. See Forms, *post.* Appendix.

2. Va. Code §§ 3223, 3240.

3. Equity Rule 12.

§ 30. **Process continued—how and by whom issued—the memorandum or præcipe.**—The subpoena is issued by the clerk of the court in which the suit is instituted, on the order of plaintiff's counsel.

§ 31. **The same—the memorandum or præcipe.**—For his own protection, the clerk requires that counsel who apply for the issuance of process shall enter a written order for the desired process, in a book kept for the purpose. This order is known as the "*memorandum*" or "*præcipe*," and the book as the "*memorandum book*."

This memorandum is only for the guidance of the clerk, and is no part of the record in the cause. It should contain all data necessary for making out the desired process—such as the names of all the parties plaintiff and defendant; the rule-day or other day to which returnable; the county or corporation in which the several defendants reside, so that the clerk may be able to direct the process to the proper officers for service; who, if any, of the defendants are infants, or lunatics, or non-residents, with proper directions for the appointment of a guardian *ad litem* for those under disability, and for an order of publication against the non-residents. If the suit is to be accompanied by an attachment or injunction, directions should be given as to the property to be attached, and as to the service of the injunction. The memorandum should contain such other details and directions as the particular case may demand, and should be signed by counsel.

The following specimen will serve as an illustration:

Form of Memorandum.

Hiram Higgins, in his own right and as executor of Joseph M. Higgins, deceased, *v.* Sallie T. Higgins, Mary H. Smith (who was Higgins) and James R. Smith, her husband, Ann C. Rose (who was Higgins) and Samuel L. Rose, her husband, the Richmond Trust Company, a domestic corporation whose chief office is in Richmond, Mariah E., William Q. and Thomas W. Brooks, infant children of Ella H. and John B. Brooks, both deceased, Joshua S. Thompson, administrator of Robert H. Simpson, deceased, and Philip W. Simpson—the latter a non-resident of Virginia, whose post-office address is 321 Chestnut Street, Philadelphia, Pa.

Issue *subpœna* in chancery against all defendants (omitting infants) to the sheriff of Albemarle county, with the following ex-

ceptions: Richmond Trust Company to the sergeant of the city of Richmond; order of publication against Phillip W. Simpson, a non-resident, in Charlottesville Progress. Appoint Albert S. Bolling, guardian *ad litem* for the infant defendants.

February 1, 1916.

WALKER & PLATT,
For plaintiff.

§ 32. Process continued—how served.—In Virginia, service of process is made by the sheriff of the county or sergeant of the corporation in which the service is made; or (save in divorce suits) service may be made by a private individual if verified by affidavit.

The method of service is by delivering a copy of the process to the defendant in person. Further provision is made for constructive service as by delivery to his wife, etc., as in the case of process from a common law court.⁴

In the Federal courts service is made by the marshal or his deputy or by a private individual appointed by the court for the purpose.⁵

§ 33. The same—when and where returnable.—In Virginia, process in chancery suits is placed by the statute, and by the prevailing practice, on all fours with process in actions at law, as well to issuance and service as to the return thereof.^{5a}

§ 34. Process continued—infant or insane defendants.—The rule denying infants or insane defendants the privilege of appearing in a court of law in person, or by attorney, is equally applicable to courts of equity. Hence, while such defendants are sued in the same manner as persons *sui juris*, yet after the bill is filed no further proceedings can be had against them until a guardian *ad litem* is appointed to represent their interest in the suit.

In Virginia the appointment may be made by the court or the clerk, and the appointee must be a competent and discreet at-

4. Va. Code §§ 3207, 3224.

5. Equity Rules 13, 15.

5a. See Va. Code § 3220. As to the method of summoning defendants, resident or non-resident, by publication, see Va. Code § 3230. As to return of process in the Federal Courts, see Equity Rule 12.

torney at law, if one can be found willing to serve. In the Federal courts the appointment is made by the judge or court.⁶

§ 35. The same—service on infants and lunatics.—In the absence of statutes declaring otherwise, it is always safer (perhaps necessary) to serve process on infant and lunatic defendants. Where a *personal* judgment or decree is desired, personal service seems essential, in spite of statutory provisions to the contrary.⁷

In Virginia, the statute declares in terms that where a guardian *ad litem* is regularly appointed, there need be no service of process on either infant or insane defendants.⁸

§ 36. Writ Tax.—In Virginia there is a writ tax of \$1.50 on every chancery suit instituted, which must be paid to the clerk at the time of the institution of the suit.

§ 37. Process continued—variance between the writ and the bill.—According to common law practice, the writ must conform to the declaration, and its failing to so conform is ground for a plea in abatement. An illustration of such a variance would be a writ in debt and a declaration in *assumpsit*, or *vice versa*—or a writ in which A. is named as plaintiff and B. and C. as defendants, followed by a declaration in which B. alone is named as defendant.⁹

No such plea is known in the equity practice for the very good reason that there is *no requirement that the writ and the bill shall conform*. At law there is but a single writ, each defendant being entitled to the service of a copy, and the original is retained by the sheriff for the purpose of making his return thereon. Hence all the copies must conform to the orig-

6. Va. Code § 3255; Fed. Equity Rule 70. See *Suits against Infants*, *infra*, § 59.

7. N. Y., etc., *Ins. Co. v. Bangs*, 103 U. S. 435. See generally, *Parker v. McCoy*, 10 Gratt. 606; *Strayer v. Long*, 83 Va. 715; *Hess v. Gayle*, 93 Va. 469; *Simon v. Craft*, 102 U. S. 427; *Evans v. Johnson*, 39 W. Va. 299; note 26 L. R. A. 739; *Chavannes v. Priestley* (Iowa), 9 L. R. A. 191.

8. Va. Code § 3255.

9. Va. Code § 3259.

inal; and by a technical rule of practice the original must conform to the declaration.

On the other hand, in equity a separate writ may be issued for each defendant, without naming any of the other defendants; and where a single writ is issued against several defendants, or separate writs against each defendant, the plaintiff may file his bill against but one of them, or against any number less than the whole—the effect being simply to exclude those not named in the bill as defendants.

The statute cited above, making provision for pleas in abatement for variance, in terms applies only to actions at law.

CHAPTER V.

PROCEEDINGS IN THE CLERK'S OFFICE.

§ 38. **Maturing the suit.**—As the proceedings in a chancery suit in Virginia, from the issuance of the original process to the maturity of the suit for hearing, are substantially similar to the procedure at law, the student is referred for further details in this connection to a learned treatment of such proceedings by Professor Graves, in his course on Practice at Law.¹

Certain differences between the procedure at law and in equity, in maturing the cause for hearing, will be pointed out in connection with the particular pleadings to be noticed hereafter.

§ 39. **Brief outline of proceedings.**—In briefest outline, the proceedings in the clerk's office for maturing of a suit in chancery are as follows: (1) Issue of process, returnable to a specified rule-day, or first day of a term; (2) return of the process by the sheriff on the day named, and on the same day filing of plaintiff's bill; (3) entry by clerk of *decree nisi* [the translation of which barbarous phrase is that unless (*nisi*) defendant shall file his answer, or other pleading, by the next rules, two weeks off, the bill will be taken for confessed]; (4) defendant files his pleading at the next rule day as required in the decree *nisi*—or, if he does not, the clerk enters an order taking the bill for confessed (*pro confesso*); (5) if answer is filed, plaintiff enters a general replication thereto, which is usually done by the clerk without special directions; and (6) whether answer be filed or not at the rule day mentioned, no further proceedings are had in the clerk's office, except to put the case upon the docket.

The case now passes from the control of the clerk into that of the court.

1. And of course to Professor Burks' scholarly treatise on the Pleading and Practice in Virginia.

§ 40. The same—in the Federal courts.—The new Equity Rules have made radical changes in the former practice. Among other notable changes the following may be mentioned here: Rule-days are abolished; ^{1a} process is returnable within twenty days from the date of its issuance, and the answer must be filed within *twenty days* after process served; ² in default of answer so filed the bill may be taken *pro confesso* (unless for cause shown) and thereafter the cause proceeds *ex parte*.³

§ 40a. Proceedings on default of appearance.—In probably all systems of pleading in civil cases, the failure of the defendant to appear and make defense, after due notice, is taken as a confession of the truth of the matters alleged against him in the plaintiff's pleading. But it will frequently happen that, in spite of such implied confession, further proof is necessary before the plaintiff may have a final judgment or decree for the amount or thing to which he is entitled.

Thus, in the common law system of pleading (slightly modified in this respect by the Virginia statute),⁴ if the action sound in damages, judgment by default of appearance is final only as to the *cause of action*, whereas the *amount of damages* must be ascertained on a writ of inquiry. If, however, the action does not sound in damages, but is brought for recovery of a specific thing or a definite amount due by contract, no writ of inquiry is required, and the office judgment is final.

§ 40b. The same—bill taken pro confesso.—In equity suits, under the Virginia practice, as indicated, where the defendant fails to plead at the rules, a decree *pro confesso* is entered against him in the clerk's office. When the order is so entered, and the cause is on the docket at the beginning of the next term, the question of further procedure is naturally one of interest and importance to the plaintiff. Is he entitled, then and there, to a decree on the merits, or is the defendant entitled to further grace, or is further proof required?

1a. Rule 19.

2. Rule 12.

3. Rules 16, 17.

4. Va. Code §§ 3285-3286.

§ 40c. **Effect of bill taken for confessed.**—Where the bill is thus confessed, and the cause is matured and on the docket, the procedure is assimilated to that in the law courts, in that the character of the decree to which the plaintiff is entitled, depends upon the nature of the case. The confession is sufficient proof of *all matters of fact properly and specifically pleaded in the bill*. If these allegations of fact be definite enough to base a final decree thereon, the plaintiff may have such a decree at once without further grace to the defendant;⁵ if not, further proceedings may be required.

For example, where process has been duly served in a suit to set aside an alleged fraudulent conveyance, a confession by default is sufficient proof of the fraud.⁶ But while sufficient proof of the *fraud*, yet if the bill in such case should fail to allege distinctly the *amount of the plaintiff's debt*,—describing it, for example, as a “large sum”; or where a trustee or other fiduciary is sued for a settlement of his accounts; or the bill seeks to enforce the lien of a judgment without indicating specifically the lands to be subjected—in all such cases, no final decree can be entered on the confessed bill, and further proof is required.

§ 40d. **Setting aside a decree pro confesso.**—The statute with reference to setting aside office *judgments* by a plea to the merits within the first fifteen days of the next term,⁷ is in terms applicable to *judgments* only, and not to *decrees*. So, it would seem that in a case proper for a decree on the merits, the plaintiff may take such a decree as the confession warrants, forthwith, on the opening of the term.⁸

But by an extremely liberal (and extremely unfortunate) provision of the statute,⁹ the defendant is permitted to file his

5. See *infra*, next section.

6. See *Price v. Thrash*, 30 Gratt. 515, 522; *Fischer v. Lee*, 98 Va. 159; *Thompson v. Wooster*, 114 U. S. 104; *Hefner v. Ins. Co.*, 123 U. S. 747; 1 Va. Law Reg. 546.

7. Va. Code, §§ 3287-3288.

8. See Equity Rule 16.

9. Va. Code, § 3275.

answer *at any time before a final decree*; although, except for good cause shown, he is not entitled thereby to have the cause continued or sent to the rules. Such leave is usually granted on condition that the trial of the cause be not thereby delayed. It seems not at all clear from the few cases construing this section ¹⁰ how far the filing of a belated answer may affect orders and decrees already entered. On principle such an answer (save where the delay is justified by good cause, or the situation is a very unusual one) should not be permitted to question or to affect matters already adjudged.

§ 40e. Bill pro confesso, continued—exceptions.—While the general rule, as stated, is that in default of appearance by the defendant a decree *pro confesso* will be entered as a matter of course, there are certain exceptions which it may be well to notice here—exceptions based on soundest principles, namely: (1) Where defendant has not been personally served with process, but has been summoned by *order of publication*; ¹¹ (2) In *divorce* proceedings ¹²—for obvious reasons; (3) In proceedings against *infants and lunatics*.¹³

10. See Pollard's annotations to § 3275.

11. See Va. Code, § 3285.

12. *Id.*, § 2260; *post*, ch. xxix.

13. *Id.*, § 3255.

CHAPTER VI.

PARTIES TO EQUITY SUITS.

§ 41. **Preliminary.**—Before passing to the consideration of the pleadings in detail, it will be well at this point to consider briefly the question of *proper* or *necessary parties* to chancery suits.

§ 42. **Parties at law and in equity contrasted.**—The difference in the practice at law and in equity with respect to parties is marked, and should receive the careful attention of the student.

This variance springs from the essential difference in the functions of the two courts. These functions cannot here be contrasted in detail, but for present purposes may be briefly summarized.

§ 43. **Parties at law.**—Courts of law sit rather as triers of a disputed right between the plaintiff asserting legal title to such right, and the defendant as the alleged infringer of that right. Such courts ignore merely equitable rights—whether as between the parties to the action, or as between one or more of these and third persons. There can be put *two sides* to an action at law, and all parties on either side must be *jointly interested, in precisely the same way*. In short, the parties on either side, howsoever numerous, are regarded as a *unit*.

Upon judgment had, the court of law, as a rule, takes no part in securing to the plaintiff the fruition of his judgment. The successful plaintiff must, in general, rely on the assistance of the sheriff to put him in possession of the money or property to which the judgment entitles him.

If the judgment be against several defendants, equally and jointly bound, the plaintiff may levy his execution on the property of any one of them, (even on that of a surety) for the full amount thereof, and wholly ignore the equities of exoneration or contribution among them. And the court of law is

powerless, in that proceeding, to interpose and adjust the burden among the several defendants.

§ 44. **The same.**—The circumstance that the judgment does not settle the whole controversy, or the certainty that, as the result of the liability fixed upon him by the judgment, or satisfied by him under the execution, a particular defendant must undertake other litigation with the plaintiff, or with his co-defendants, or with strangers, before the entire subject-matter of the controversy is beyond dispute, plays no part in the proceeding at law.

For example, a court of law (in absence of statute) excludes an equitable defense, and gives judgment for the plaintiff, though the court well knows that the defendant may apply to the same court, on its equity side, and have the judgment enjoined. A trustee acting under the most solemn instrument of express trust, in which he is distinctly excluded from possession of, or beneficial interest in, the trust property, is in a court of law complete owner of the estate, and may with impunity exclude the beneficiary from all control or enjoyment thereof. Indeed, at his suit, the court of law will adjudge the trustee complete owner of the trust property, and will oust the beneficiary from the possession or enjoyment.¹

§ 45. **Parties in equity.**—On the other hand, courts of equity sit not merely to decide disputed questions of legal right and legal liability, but, in large measure, as *administrative* tribunals, whose duty and pleasure it is to make a *complete disposition* of the property or other subject-matter of the litigation; and, to that end, to settle, once for all, the equitable as well as legal rights of *every person who has an interest in the subject-matter*, so that every such person shall be bound by the decree, and no further litigation among the parties will be necessary or permissible.

Courts of equity, furthermore, possess proper machinery for specifically securing to the successful party the benefit of the decree, under the very eye of the court.

1. Altered in some particulars by Va. Code, §§ 2741-2742.

§ 46. **The same.**—In order that all interested parties may be thus bound by the proceedings, they must be made *parties to the suit*, as plaintiffs or defendants—in accordance with the time-honored principle that every man is entitled to his day in court, which, written at large, means that no man is bound by a judicial proceeding to which he was not a party, with opportunity to assert or defend his rights.

It is hoped that this brief contrast between the juridical conception of the functions of courts of law and of equity, respectively, may make clear to the student why the rule as to parties is so widely variant in the two systems; and may, in a measure, prepare the student to understand the reason and application of the rule as to parties in equity, now to be mentioned.

§ 47. **Rule as to parties in equity.**—It is not possible to formulate a rule full enough, and accurate enough, to determine the question of parties for every case in equity. This often becomes a difficult problem for even the most experienced practitioner. Nor are the courts always in harmony on the question of parties.

But, save here and there in an unusual or complicated case, well-informed practitioners find the question of parties in equity comparatively simple. In case of doubt, the safe practice is to resolve the doubt affirmatively, by including the doubtful party—since, on objection made, the result of the erroneous inclusion is merely the dismissal of the improper party from the cause.

Now as to our rule—sufficient, it is hoped, for present purposes: *All persons in being, and within the jurisdiction of the court, who are in anywise interested, legally or equitably, in the subject-matter of the litigation, and whose interests may be directly affected by the proceedings, whether beneficially or detrimentally, or who might again litigate the precise matter adjudicated, should be made parties to the suit.*

§ 48. **Classification of parties — “necessary” and “proper” parties.**—Courts and commentators usually classify parties in equity as either *necessary* or *proper* parties.

Those whose presence is essential to a complete determination

of the controversy or disposition of the subject-matter, so far as concerns the rights of the plaintiff, are termed *necessary* parties—since without their presence in the suit there can be no effective decree.

On the other hand, *proper* parties are those without whose presence in the suit “a substantial decree may be made, but not a decree which shall completely settle all questions and conclude all rights involved in the litigation.”²

A somewhat different rule as to parties is made in the Federal courts of equity, consequent upon the limitation imposed upon their jurisdiction by the requirement of diverse citizenship, and by their inability to bring in parties who are without the state. In these courts the rule is somewhat more liberal than in the state courts.³

§ 50. Parties plaintiff.—The technical rules of the law courts that only those having *legal* title to the subject-matter of the controversy may sue, and that those holding the legal title *must* unite as plaintiffs, howsoever numerous, is unknown to the equity practice.

On the contrary, where the case is otherwise proper for a court of equity, any person who has an interest, legal or equitable, may, as sole plaintiff—whether others be interested with him or not—file a bill for the protection and enforcement of his rights. If others with whom he is jointly interested, refuse to unite as plaintiffs, they may, and should, be made parties defendant, with an explanation of the reasons why they are not parties plaintiff.⁴

§ 51. The same—real party in interest.—At law, in a limited class of cases, it is common practice to permit the equitable owner of a right to assert it by an action in the name of the holder of the legal title. Indeed, in absence of an enabling statute, this is the only way in which the equitable owner can,

2. Fletcher, Eq. Pl. & Pr. 40.

3. See Equity Rules, 37-44; *Minnesota v. Northern Securities Co.*, 184 U. S. 199; Fletcher, Eq. Pl. & Pr. 40.

4. See Equity Rule 37—in this respect merely declaratory.

in any case, assert his rights at law. A once familiar instance of this practice was that of the assignee of a *chose in action* suing in the name of the assignor.

In equity, on the other hand, the rule is invariable that the suit must be brought in the name of the *real party in interest*, and not in the name of another.⁵

§ 52. The same—doctrine of representation of parties.—But notwithstanding the general rule as to parties in equity, in some cases, a few as representing the rest are allowed, for convenience, and to avoid an undue multiplication of parties, to prosecute the suit in behalf of themselves and the others concerned. This happens notably in case of shareholders in a corporation, tax-payers of a municipality, and members of a voluntary society, seeking a common purpose, where one may sue in behalf of all.⁶

§ 53. The same.—Judge Story⁷ sums up the most usual cases of exception to the general rule, as follows:

(1) Where the question is one of a *common or general interest*, and one or more sue or defend for the benefit of the whole;

(2) Where the parties form a *voluntary association* for public or private purposes, and those who sue, or defend, may fairly be presumed to represent the rights and interests of the whole;⁸

(3) Where the parties are *very numerous*, and although they have, or may have, separate distinct interests, yet it is impracticable to bring them all before the court.

§ 54. Representation of parties—continued.—Upon the principle of *virtual representation* it is held not to be necessary

5. *Kane v. Mann*, 93 Va. 239; *Penn v. Hearon*, 94 Va. 733. By a recent unfortunate statute in Virginia this sensible and long-established rule seems abrogated. Acts 1897-'98, page 437.

6. *Osborne v. Taylor*, 12 Gratt. 133; *Faulkner v. Davis*, 18 Gratt. 651; *Coffman v. Sangston*, 21 Gratt. 263; *Lynchburg v. Dameron*, 95 Va. 545; *Lile's Notes on Munic. Corp.* 10.

7. *Eq. Pl.* 97-106.

8. See *Siegfried v. Perkins*, 97 Va. 444.

to make parties, in respect to suits touching titles to lands, persons entitled to remainders or executory limitations coming *after the first estate of inheritance*, and that notwithstanding such persons be not parties, they are yet bound by the decree.⁹

So where all the parties are brought before the court that *can be brought*, although the representative party be only *tenant for life*, it is yet held to be sufficient, and all parties are bound by the decree.¹⁰

§ 55. The same—Federal court rule—trustee as representative of creditors.—By the ordinary rules of chancery practice, both the trustee and the *cestui que trust* are necessary parties to a suit involving the trust estate. In the Federal courts, however, and particularly in the case of mortgages or deeds of trust made by corporations to secure an issue of bonds, it is the settled rule that the trustee is the proper representative of the interests of the bond-holders, and the latter will not be admitted as parties, save under special circumstances.

The rule rests in the inconveniences and delays likely to result from the presence of numerous litigants. The rule also avoids difficulties of maintaining the federal jurisdiction when resting on diverse citizenship.¹¹

§ 56. Parties in several characters.—The student should observe here the striking difference between the practice at law and in chancery in this particular. At law, one cannot sue or be sued in several characters, *e. g.*, in his own right and as administrator. In equity, however, one may, in a proper case, be plaintiff or defendant in as many characters as he represents, *e. g.*, "John Smith, in his own right, and as executor of Hiram Smith, deceased, and as trustee under the will of Mary Smith, deceased,"

9. *Baylor v. DeJarnette*, 13 Gratt. 166; *Faulkner v. Davis*, 18 Gratt. 684; *Finney v. Edwards*, 75 Va. 51; Equity Rule 38.

10. *Baylor v. DeJarnette*, 13 Gratt. 166; *Harrison v. Walton*, 95 Va. 221.

11. See *Bates*, Fed. Eq. Pr. 55; *Corcoran v. C. & O. Canal Co.*, 94 U. S. 741; *Va. Pass. & Power Co. v. Fisher*, 104 Va. 121—approving the rule; 30 Am. Law Review 161; *Kent v. Lake Superior, etc., Co.*, 144 U. S. 75. See further, Equity Rules, 37, 41.

may sue "William Brown, in his own right, and as committee of Anna Brown, a lunatic, and as guardian of Robert Brown, an infant, and as executor of Henry Jones, deceased."

And where it is doubtful whether the right be claimed in one character or another, the plaintiff may sue in both characters, and a decree may be rendered in his favor in that character in which he appears to be rightfully entitled.¹²

§ 57. Defect of parties—how objection made.—Where the defect appears on the face of the bill, the proper course is to demur. Where it does not appear on the face of the bill, the proper course is to set up the defect by plea or answer.

But if it appear to the court in any manner, that no proper decree can be entered until necessary parties are brought in, the court will itself decline to proceed until such absentees are properly made parties. And, in a case of this kind, objection may be made for the first time in the appellate court—for the very good reason that the objection is one that cannot be waived, since the appellate court can no more proceed without necessary parties than can the lower court.

Where, for example, it distinctly appears that the real property of which partition is sought, belongs to five persons, but that only four of them are parties to the suit, the court will not stultify itself by dividing the property among the four, well knowing that the absent party will not be bound by the decree, and may later, in a new suit, render the entire proceedings in the first suit of no effect. Clearly, in such case, the circumstance that none of the four makes objection to the absence of the fifth co-owner will not prevent the court itself, *ex mero motu*, from raising the objection.

§ 58. Parties continued—suits by infants and insane persons.—Infants sue in their own names¹³ by a *prochein ami*, or next friend,¹⁴ and not by their guardians. Lunatics who have

12. *Brent v. Washington*, 18 Gratt. 526.

13. This means that the suit must be the *infant's suit*, and not that of the next friend. If in the name of the next friend "*on behalf of the infant*" it cannot be maintained. *Morgan v. Potter*, 157 U. S. 195.

14. Va. Code, § 2416.

been so adjudged, and for whom a committee has been appointed, should sue in their own names by the committee, who may be styled also as next friend. In the absence of the committee, suit may be by next friend.¹⁵

15. *Jackson v. Counts*, 106 Va. 7; *Wheeler v. Thomas*, 116 Va. 259, 270; *Lake v. Hope*, 116 Va. 687; Equity Rule 70. There is usually *no formal appointment* of the next friend of an infant or lunatic; his being named as such in the bill, and the suit proceeding without objection, is a tacit recognition of him as such by the court. Indeed, it seems to be the settled rule of the unwritten law that any person, though a stranger, may file a bill in the name of the infant, for the purpose of enforcing a supposed right belonging to the infant, even against the latter's will. On objection made, the court will order a proper inquiry, by a master or otherwise, to determine whether the suit shall proceed, and will make such other orders as may seem proper for the protection of the infant's interests. Story, Eq. Pl. 60; *Klaus v. State*, 54 Miss. 644; *Bethea v. Call*, 3 Ala. 449; *Judson v. Blanchard*, 3 Conn. 579; *Fulton v. Roosevelt*, 1 Paige 178, 19 Am. Dec. 409; *Kingsbury v. Buckner*, 134 U. S. 650—the opinion in which, by Harlan, J., contains a learned discussion of suits by *prochein amis*, and the powers of the latter.

The statement that there need be no special appointment by the *prochein ami* seems questioned, without noticing the leading authorities, and on what appears to be a mistaken view of the authorities cited, in the recent case of *Lake v. Hope*, 116 Va. 687, 707-709. It is not quite clear from the opinion whether the fatal error was in the omission of the usual phrase "admitted by the court to prosecute the interests of the said lunatic (or infant) in this cause," which, in the absence of specific objection, is taken to be an implied appointment, or whether the court meant to assert the necessity of a formal appointment in every case. If the former were meant, the ruling, though highly technical and out of keeping with the liberal spirit of equity pleading in Virginia, is not otherwise objectionable. But if the court meant to declare that an *express and formal appointment of the prochein ami is necessary*, the conclusion is not supported by approved authority. Since the real point of the decision was that as the affairs of the lunatic were already in the hands of a regularly appointed committee, the suit could not be maintained by the next friend, there was no occasion to pass upon the regularity of the appointment of the next friend, and the discussion of that question was *obiter*.

The powers of the *prochein ami* are extremely limited. While he has control of the suit, under the immediate supervision of the court, he has no authority to receive funds payable to the infant, nor to

§ 59. **The same—suits against infants and insane persons.**—These are brought and conducted as other suits in chancery—against the infant or lunatic personally—but the defendant's appearance and defense are made by a guardian *ad litem*¹⁶ specially appointed to represent the incompetent.¹⁷ Here again the answer or plea must be *in the name of the incompetent*, by the guardian *ad litem*, and not in the name of the latter on behalf of the former.

make admissions to the prejudice of the infant, nor to compromise the suit. He is a mere *quasi* officer of the court, and subject to its directions. *Morgan v. Thorne*, 7 M. & W. 400, 406; *Miles v. Kaigler*, 10 Yerg. (Tenn.) 10, 30 Am. Dec. 426; *Cratty v. Eagle* (W. Va.), 18 S. E. 59; *Bernard v. Merrill* (Me.), 40 Atl. 136; *Burwell v. Corbin*, 1 Rand. 152, 10 Am. Dec. 494.

16. The powers of the guardian *ad litem* are quite similar to those of the *prochein ami qu. vid. supra*. While he may not, by his admissions or stipulations, prejudice the rights of the infant, he may consent to or waive mere matters of procedure not affecting the substantial rights of the ward; for example, he may consent to a hearing in vacation, or to a continuance of the cause, etc. *Thompson v. Maxwell, etc., Co.*, 168 U. S. 451; *Waterman v. Lawrence*, 19 Cal. 210, 79 Am. Dec. 212; *Lemmon v. Herbert*, 92 Va. 653; Va. Code, § 3427.

17. Where the affairs of the lunatic defendant are in the hands of a regularly appointed committee, whose interests are not in conflict with those of the lunatic, the latter may make defense, and no guardian *ad litem* is necessary. *Hinton v. Bland*, 81 Va. 588 (*per Lewis, P.*)

CHAPTER VII.

OUTLINE OF THE PLEADINGS.

§ 60. **Preliminary.**—The pleadings and the practice in chancery are much less technical and complex than those at law. Framed only for the administration of justice between man and man, they are, in the main, based on practical convenience and common sense, unincumbered by hard and fast rules that owe their origin to an outgrown *regime*. In these respects, the equity procedure is in striking contrast with the procedure at common law, which, in many aspects, has elevated questions of form and of adherence to technical rules above considerations of justice to litigants. In the former, the question is rather, Which party has the better right? In the latter, unmodified, Which counsel has the better wit?

§ 61. **The pleadings—continued.**—That the student may obtain a bird's-eye view of the pleadings which he is to encounter in our subsequent study of them, the more important pleadings in chancery are here listed, with a very brief statement of the general function of each—leaving a more detailed explanation of these functions for later treatment.

1. AGGRESSIVE PLEADINGS.

(1) *The Original Bill.*

A more or less formal statement of the plaintiff's equities which it is the purpose of the suit to protect or enforce.

(2) *The Amended Bill.*

A second bill filed by the plaintiff to correct some defect, or supply some omission, *inherent in the Original Bill*—and used also to take the place of a special replication.

(3) *The Supplemental Bill.*

Substantially the same as the Amended Bill, except that the defect to be corrected, or the matter to be supplied, is due to some occurrence happening *since the Original Bill was filed*.

(4) *The Cross Bill.*

A bill filed in a pending suit by a *defendant*, against the plaintiff, or against a co-defendant, or both, for the purpose of obtaining either discovery or affirmative relief, or both, and not merely for defense. It inaugurates a cross-suit in connection with the subject-matter of the original suit. The student must observe that a cross-bill may be filed only by a *defendant*.

(5) *The Petition.*

An aggressive pleading, filed in a pending suit, usually by a *stranger* to the suit (that is, one not a party), with the purpose of being made a party, in order to assert some right involved in the litigation—whence the term “intervention proceedings.”

(6) *The Bill of Revivor.*

A bill filed in a pending suit, which, by reason of death of a party (or, at common law, the marriage of a *feme*) has abated, and the interests of the decedent have been transmitted to others as his successors in title. The purpose of the Bill of Revivor is to set up the rights of the successor or successors of the decedent, and to revive the original suit, so that it may continue, in its changed form, to a final decree.

(7) *The Bill of Review.*

A bill filed in the trial court, and after a final decree, by any party to a pending suit, plaintiff or defendant, for either of two purposes: (a) To call the attention of the court to some *error of law* committed by the court in previous proceedings in the cause, and apparent on the record, and detrimental to the party filing the Bill of Review; and praying the same court to review the decree and correct the error; or (b) To bring to the attention of the court *new and material* evidence discovered since the final decree, which evidence could not have previously been discovered by reasonable diligence—and praying for a rehearing on such newly discovered testimony.

The circumstances under which such a bill may be filed, as well as the rehearing of interlocutory decrees, will be considered later.

2. DEFENSIVE PLEADINGS.

(1) *The Demurrer.*

A pleading which raises an issue of *law*, and not of fact. Its purpose is to test the sufficiency of the adversary's case *as made by the pleading demurred to*. It admits, for purposes of demurrer, all the facts properly pleaded by the adversary, and submits to the court the question whether these facts entitle the adversary to the relief sought. It may be filed only to an aggressive pleading.

(2) *The Plea.*

A pleading by which the defendant offers a single fact, or a combination of circumstances all tending to *one point*, as a complete defense to the whole bill, or to some distinct and material portion thereof—*e. g.*, the statute of limitations, the statute of parol agreements, a denial of the contract alleged, payment, etc.

(3) *The Answer.*

The most common method of making defense to a suit in equity. By the answer, the defendant enters into a defense at large of all the equities asserted in the bill. The answer makes the discovery called for, if any, or explains why it cannot be made—and sets out at length the circumstances relied upon to repel the plaintiff's claim. A striking peculiarity of the answer, as we shall see later, is that it is not only a *pleading*, but, by the unwritten law, it is an *instrument of evidence* as well.

(4) *The Disclaimer.*

A rather unusual pleading, by which one who has been impleaded in a chancery suit, denies having, or ever having had, any claim, title or interest, or any pretense thereof, in or to the subject-matter of the litigation, and disclaiming any interest in such litigation. Such a pleading cannot, therefore, be resorted to by one against whom the plaintiff asserts a claim.

3. PLEADING COMPLETING THE ISSUE.

The Replication.

The very brief pleading by which the plaintiff takes issue on the facts set up in defendant's plea or answer. It is a bare denial of such facts, and its purpose is simply to put the defendant on notice that his allegations of fact are not admitted, but must be established by evidence. On the filing of the replication, the parties are supposed to be at issue, and the cause matured and ready for the taking of testimony.

Reminder.—The student is again reminded that the foregoing list presents the principal pleadings in equity only in barest outline, and that a more minute study of them must be made in the following pages.

We are now ready to take up a consideration of the several pleadings in somewhat greater detail.

CHAPTER VIII.

MULTIFARIOUSNESS.

§ 62. **Multifariousness—definition.**—Multifariousness in equity pleading means the improper joinder of several causes of action in the same suit—each capable of enforcement in separate proceedings. It is the correlative of “misjoinder” in courts of law.

§ 63. **Multifariousness—several kinds.**—Several aspects of this serious fault in equity pleading are encountered in practice: (1) the joinder of two or more *independent claims* by the *same plaintiff against the same defendant*; (2) the joinder of *independent claims* by *several plaintiffs*, each asserting separate claims against one or more defendants, whether the latter be jointly concerned or not; or conversely, (3) the joinder of two or more *distinct claims* by the plaintiff against *several defendants, all the defendants not being interested in all the claims* asserted,

§ 64. **The same—the first class.**—As shown in the preceding section, multifariousness of the first class occurs where two or more distinct and independent causes of action—each in itself sufficient for the jurisdiction of the court—are asserted by the plaintiff against a defendant or defendants, where every defendant is interested in all the claims asserted in the bill.

An illustration of a bill of this character would be a suit by A. against B., C. and D., for specific performance of a contract between the plaintiffs and the three defendants for the sale of Blackacre, and also for the partition of Whiteacre belonging to the four parties.

§ 65. **Multifariousness—first class continued—effect.**—It is quite clear that where the several claims asserted by the same plaintiff, in the same bill, *arise out of the same transaction*, no valid objection can be made on the ground of multifariousness.¹ Indeed, in such case, it is the plaintiff's duty to unite all

1. Pack v. Whitaker, 110 Va. 122.

such claims in the same suit.²

Even where the several equities asserted do not arise out of the same transaction, and are wholly independent of each other, as illustrated in the preceding section, it does not necessarily follow that the court will treat the bill as multifarious. The fault here is not so serious as the other forms of multifariousness; and the question whether or not such a bill will be sustained will depend largely on the circumstances of each case. If it seems to the court that both equities can conveniently be administered in a single suit, the court may, in its discretion, overrule the objection and permit the bill to stand.³

If, however, the court should be of opinion that the several independent claims can more conveniently be dealt with in separate suits, it may sustain the demurrer, and require the plaintiff to assert his claims separately.

§ 66. The same—second class—distinct plaintiffs asserting distinct claims.—A more serious kind of multifariousness occurs where two separate and distinct claims are asserted, not by the same plaintiff, or plaintiffs in joint interest, as in the preceding section, but by *plaintiffs whose interests are separate and distinct*, and whether against the same or different defendants. Thus, where A. sues C. for specific performance of a contract to convey Blackacre, and B. unites as plaintiff in the same bill, seeking specific performance of a separate contract with C. for the conveyance of Whiteacre, the bill is clearly and hopelessly multifarious.⁴

§ 67. The same—third class—distinct and unrelated claims against several distinct defendants.—A third and equally hopeless form of multifariousness occurs where several matters of distinct natures are asserted against several defendants, but *all the defendants are not interested in all the matters litigated*. As a rule, this will not be permitted; and on de-

2. *Zetelle v. Myers*, 19 Gratt. 62.

3. See *Story*, Eq. Pl. 271 (n.), 278 (n.), 280; 1 *Daniell*, Ch. Pr. 335; 5 *Va. Law Reg.* 840. In *Seefried v. Clarke*, 113 *Va.* 365, a bill to set aside a conveyance for fraud and for partition of the property involved was sustained. Such practice is expressly authorized by Equity Rule 26.

4. This form of multifariousness is condemned by Equity Rule 26.

murrer the court will dismiss the bill.⁵ Creditors' bills and administration suits, as we shall see, are notable exceptions to this rule—the reason being that the purpose of such suits is to make a complete disposition of a fund or estate, and this can only be done in a single suit.

It is important, however, to observe that where one of the causes of action alleged cannot be maintained, (as, for example, for lack of jurisdiction), the attempt to connect it with the other cause of action will not render the bill multifarious; but the former will be regarded as mere surplusage. In short, in order to render a bill multifarious there must be *two complete, independent causes of action asserted*—the maxim being *utile per inutile non vitiatur*.

§ 68. The same—general observations.—While these rules are comparatively simple, the courts have much difficulty in applying them, and it is common to find it stated judicially that a determination of the question whether a bill is multifarious or not, depends largely upon the peculiarities of each case, and the discretion of the court.⁶

An illustration of a multifarious bill is presented in the case cited in the footnote.⁷ In that case J., A. and W. had been partners; W. withdrew, and a new partnership was formed between J. and A., which was later dissolved. J. then filed a bill against both of his former partners, A. and W., for a settlement of the accounts of *both partnerships*. Here, it was properly held, that inasmuch as W., who first withdrew, had no interest in the settlement of the accounts of the second partnership between J. and A., it was improper that he should be united in the suit, and hence that the bill was multifarious.

§ 69. Multifariousness continued—how objection made—effect.—As the objection of multifariousness must necessarily appear on the face of the bill, the proper method of making the objection is, of course, by demurrer. If held to be multifarious, the misleading is fatal, and the bill will be dismissed.

5. This is likewise condemned by Equity Rule 26.

6. See *Brown v. Bedford, etc., Co.*, 91 Va. 31; *Spooner v. Hilbish*, 92 Va. 333; *School Board v. Farish*, 92 Va. 156; *Saunders v. Bank*, 113 Va. 656.

7. *Dunn v. Dunn*, 26 Gratt. 291.

CHAPTER IX.

THE BILL.

§ 70. **No forms of action in equity.**—In the equity procedure one encounters no bewildering rules as to the name or classification of the particular suit, or, according to the nomenclature at law, “form of action.” When from an investigation of the law and facts of his case, counsel has determined that he has a good cause for equitable relief, he is saved the problem of wasting brain-sweat in deciding whether he shall sue in debt, *assumpsit*, or covenant, in trover or replevin, in trespass *vi et armis* or trespass on the case. He simply decides to file a “bill in equity.” If in this bill he states a case proper for equitable relief, and supports his allegations by proper proof, the relief will be granted, without regard to lack of form in the bill. Here, as elsewhere, “equity looks at substance, not at forms.”

§ 71. **Bills continued—classification.**—While a scientific classification of bills is of no practical importance, it may be well to indicate the classes into which they naturally fall, and into which courts and text-writers divide them. These are (1) *Original Bills*, and (2) *Bills not Original*.

These terms of themselves indicate the difference between the two classes. The *Original Bill* is the first pleading filed by the plaintiff. In it the case is stated, and the desired relief prayed for. In the later development of the case, it frequently becomes necessary for the plaintiff to amend or supplement his first statement, whence we have an “amended” or “supplemental” bill; or to revive the suit which has abated by the death of a party, whence the “bill of revivor”; or for a defendant to set up a counter-claim against the plaintiff or some other defendant, which is done by “cross-bill”; in all of which cases the bills are *not original*, and hence are so classified.

(1) *Original Bills.*

§ 72. **Classification.**—The classification of original bills is extremely simple, namely, (a) Those praying for relief; (b) Those not praying for relief. Here, again, no explanation of terms seems necessary.

§ 73. (a) **Bills praying relief.**—A bill praying for relief is one that calls upon the court by its decree to protect or enforce some equitable right of the plaintiff—as, for example, a bill for an injunction, or for the specific performance of a contract. Most bills filed in equity are of this nature.

§ 74. (b) **Bills not praying relief.**—These are comparatively rare. They are filed either to obtain evidence for use in another forum (“discovery” only), or to preserve evidence which is likely to be needed in future litigation, and is in danger of being lost by reason of the apprehended death or removal of witnesses (“perpetuation of testimony”). Such bills will be more particularly noticed hereafter.

(2) *Bills Not Original.*

§ 75. **Bills not original.**—As already indicated, all bills filed in suits subsequent to the original bill, are classified as *Bills not Original*.

Following the foregoing classification, we shall now take up, in order, the several classes of bills mentioned in this chapter.

CHAPTER X.

THE BILL IN DETAIL.

(A) ORIGINAL BILLS PRAYING RELIEF.

§ 76. The purpose of the bill.—The purpose of the bill is to state the plaintiff's case for the information of the defendant in the preparation of his defense, and for the information of the court in the trial of the cause.

The defendant is supposed to know the plaintiff's grievances only from his statement of them in the bill; and it is to the precise case thus stated, and to that case only, that the defendant can be required to answer; and to the case so made the evidence must be confined. Hence the importance of an accurate knowledge, by counsel, of the facts of his case and of the law applicable thereto, before he undertakes to present these facts in the shape of the bill. He must prove the case substantially as made in the bill.

It is true that courts of equity are liberal in permitting amendments for the purpose of patching up a rickety pleading, or to meet unexpected phases of the proofs, so that a serious defect in the bill is not necessarily fatal to the plaintiff's case; but such amendments, when the necessity therefor is due to his fault, reflect upon counsel's professional skill, and cause delay and expense.

§ 77. The bill continued—several parts.—Commentators usually divide original bills into nine parts. The statement that such bills consist of so great a number of parts, is not meant to convey the idea that the rules of chancery pleading require any specific division into parts, or that counsel should consciously have these parts in mind in drawing the bill; but rather that in the orderly setting out of an equitable claim, the statement naturally resolves itself into these, or some of these, parts.

The emphasis usually laid upon these several parts or divisions of the bill may create the erroneous and discouraging im-

pression upon the mind of the student that a bill in equity is a quite technical and complicated pleading.¹

1. *The Several Parts of the Bill.*²

§ 78. (1) The address.—Bills are addressed to the chancellor, by his official designation. The name of the chancellor may be used or not at the discretion of the draughtsman. Thus: "To the Honorable Archibald D. Dabney, Judge of the Corporation Court of the City of Charlottesville;" or "To the Honorable the Judge of the Corporation Court," etc.; "To the Judges of the District Court of the United States for the Western District of Virginia."

§ 79. (2) Names of plaintiffs.—After the address to the chancellor or court, the bill should open with a statement of the names of the several plaintiffs, with their respective places of abode. In the bill they designate themselves as "your orators," or "your complainants." In referring to himself, the plaintiff in his bill, and the defendant in his answer or plea, always speak in the third person, and never in the first.

§ 80. (2a) The same—pleading by initials.—In the interest of the certainty required by the rules of good pleading, and especially for the purpose of more certain identification of the parties litigant, the names of the parties, both plaintiff and

1. The same impression would arise if the student endeavored to learn from a printed book, and for recitation thereon in the lecture room, the several divisions of his weekly home-letter. He would learn that his letter should consist of many parts, namely, (1) the date and post-office address in the righthand corner, and not in the left; (2) the complimentary address, as "Dear Mother;" (3) acknowledgment of the last letter from home, with check (if any) enclosed; (4) comments on the late home news; (5) information as to the writer's health; (6) assurances that he is learning much law—especially Equity Pleading; (7) results of his last examinations; (8) request for additional check. Number (9) and others may be supplied by the student himself. Perhaps this comparison may induce us to approach the consideration of the nine parts of the bill with courage. A simple form of bill appears in the Appendix, *post*.

2. See Equity Rule 20, the purpose of which is to simplify and shorten bills in the Federal courts.

defendant, should be stated with the surname, and at least one Christian name.

Pleading by initials violates the rules of scientific pleading, and is forbidden by the practice prevailing in many states. Under the loose practice obtaining in Virginia, such method of pleading is not uncommon. It is not permitted in the Federal courts.³

§ 81. (2b) Description of plaintiffs, continued—statement of residence.—Better pleading requires not only that the names of the complainants be thus stated with certainty, but that, for similar reasons, their places of abode should likewise be stated. This good practice does not, however, prevail generally among Virginia pleaders.

It is needless to add that where the jurisdiction of the court depends on questions of residence or of citizenship, such residence or citizenship is an essential allegation.⁴

§ 82. (2c) The same—Federal court rule.—By Equity Rule 25, it is provided that every bill, "shall contain the full name when known, of each plaintiff and defendant, and the citizenship and residence of each party."

§ 83. (3) Statement of plaintiff's case—"stating part."—This statement is naturally and essentially the most important part of the bill. It is here that the plaintiff sets out, *in extenso*, the ultimate facts constituting his case against the defendant or defendants.

These facts should be stated with certainty, directness and clearness, and not by way of inference, and always according to their logical sequence.⁵

3. "The description of him" [one of the parties] "by initials," says the Supreme Court of the United States, per Gray, J., "is but an illustration of a loose and careless practice which this court does not countenance." *Walton v. Marietta Chair Co.*, 157 U. S. 342. See also 31 Cyc. 96; Equity Rule 25 (1).

4. For example, jurisdiction of divorce suits in Virginia exists only where one of the parties has been domiciled in the state for one year. Va. Code, § 2259.

5. "A short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence." Equity Rule 25 (3).

Wherever the plaintiff's case depends in whole or in part on documentary evidence, such documents should be here briefly described according to their legal effect, and incorporated into the bill by reference—as “the original (or an exemplified) copy of the said deed (or other document) is herewith filed as a part of this bill, marked Exhibit No. 1 and prayed to be read as a part of this bill as if herein set out at large;” and the document in question should be filed along with the bill.

In drawing this portion of the bill, the draughtsman should be especially careful to see that the facts stated constitute a proper case for equitable relief; and should test his final draught by himself interposing, mentally, a demurrer to his own pleading. If the statement will withstand a demurrer, and is susceptible of proof by available testimony, the young pleader may feel well satisfied with his work, and confident of a favorable result.

§ 84. (4) The common confederacy clause.—The use of this clause is now practically obsolete, and mention of the clause is only for its historical interest. One of the original grounds of equity jurisdiction was the existence of a combination and confederacy of the powerful to overawe the weak, and to resist or pervert the administration of justice in the ordinary common law courts—a situation, in general, long since passed away, and with it the necessity and the use of the clause.

§ 85. (5) The charging part.—This part of the bill (when used) contains a statement of the *anticipated defense* (other than a mere denial), followed by an allegation (or “charge”) showing the futility of such defense.

In many cases there is no occasion to use this clause, and in none is it essential.

§ 86. (5a) The same—advantages.—While, as stated, the clause may be omitted, it possesses, when proper circumstances concur, at least one important advantage, namely, in obviating the necessity for a further pleading by the plaintiff (in former times a special replication, but now superseded by the amended bill) in reply to the defense thus anticipated, when actually set up.

Let us suppose, for example, that the plaintiff, suing for

specific performance of a contract, anticipates that the defendant will set up the defense of infancy, or the statute of parol agreements, which defense the plaintiff expects to meet by proof, in the first case, of ratification after full age; or, in the second case, of part-performance. If such defense be not anticipated, and the ratification or part-performance be not charged in the bill, the result will be that when the defendant sets up the defense, the plaintiff will be obliged to file a new pleading in reply. in order properly to put the question of ratification or of part-performance in issue. This, as stated, in modern practice, calls for an amended bill. But by anticipating the defense, and charging the defendant with the ratification or the part-performance *in the original bill itself*, the question of ratification or of part-performance is presented as a part of the issue *at the outset*, without the further delay and expense of amending the bill; and the defendant, if required, must make discovery in the first instance as to the truth of the charge of ratification or part-performance.

§ 87. (6) The jurisdiction clause.—This clause consists of a general averment of jurisdiction in equity—the usual form being that the plaintiff is “without remedy save in a court of equity, where matters of this kind are only and properly cognizable.”

The clause is of no importance, and probably never was. Where the case made by the bill is not one for equitable relief, the presence of this clause does not cure the defect; nor does its omission affect the jurisdiction where the bill otherwise states a case proper for the cognizance of a court of equity.

Inasmuch, however, as the clause is still found in practically all bills, the student is advised to follow general custom by inserting the averment.

§ 88. (6a) The same—special jurisdictional facts.—Should the court be one of limited jurisdiction, or should there be special statutory requirements operating as conditions precedent to jurisdiction, the existence of such conditions must of course be alleged.

Thus, the jurisdiction conferred by statute on the chancery

courts of Virginia to entertain suits for divorce, prohibits the exercise of this jurisdiction unless one of the parties has been domiciled in this state for at least one year preceding the commencement of the suit.⁶ The bill in such a case should, therefore, make proper allegation of domicile in this state. And so, in a suit in the Federal courts, if the ground of jurisdiction be diverse citizenship of the parties, the bill must specifically allege such diversity of citizenship.⁷

§ 89. (7) Prayer for answer—interrogating clause.—This is commonly called the “interrogating clause,” since it is here that the plaintiff, if he desires to search the conscience of the defendant, calls upon him to make answer under oath, to all matters and things alleged against him in the bill.

And, in order to prevent evasion, and more carefully to search the defendant’s conscience, it is here that the plaintiff propounds, or may propound, specific and searching interrogatories, framed with such particularity and such variations as will compel a full answer.

§ 90. (7a) The same—waiver of answer under oath.—As we shall see later, the answer of a defendant, when responsive to the bill, is evidence in his behalf, and, by the rules of the forum, the defendant cannot be deprived of this advantage by a waiver in the bill of an answer, or of the oath thereto. In modern times, however, by statute, in most of the states the plaintiff may waive an oath to the defendant’s answer, and thus reduce the answer to a mere pleading possessing no evidentiary value.^{7a} If such waiver is to be inserted in the bill, it should be done under this seventh clause.

§ 91. (7b) The same—in Virginia—prayer for parties.—According to established practice in Virginia, this seventh clause consists not only of a prayer for answers from the defendants (with or without waiver of the oath), but, in addition,

6. Va. Code, § 2259. See *Divorce Suits*, *post*, Ch. xxix.

7. “A short and plain statement of the grounds upon which the court’s jurisdiction depends.” Equity Rule 25 (2).

7a. See *The Answer*, *post*, Ch. xvi.

a prayer that the adversaries, by name, be made parties defendant to the bill.⁸

In Virginia, therefore, this clause becomes not only a prayer for answers but a prayer "for parties defendant."

§ 92. (8) Prayer for relief.—This is one of the most important parts of the bill, and should receive the thoughtful attention of the draughtsman. Prayers for relief are of two kinds: (a) For *special relief*; and (b) for *general relief*.

§ 93. (8a) The same—prayer for special relief.—After having made a full statement of his grievances, and demanded answers to his charges from the defendants by name, the bill would necessarily be incomplete did it not round out the complaint by asking for certain specific relief—as that the contract set up in the bill be enforced, or rescinded, or reformed; that the wrong complained of be enjoined; that the mortgage asserted in the bill be foreclosed, etc.⁹

§ 94. (8b) The same—prayer for alternative relief.—One of the fundamental rules of pleading at law is that "pleadings must not be in the alternative." This rule is not insisted upon in equity pleading, and may be wholly ignored in the prayer for relief. That is to say, where the plaintiff, in the stating part of his bill, has made a case proper for equitable relief, but is uncertain as to the specific relief to which he may be entitled on the case made in the bill and to be made in the proofs, his prayer for relief may be in the alternative. By this is meant, that the plaintiff may pray that one kind of relief be granted, or, that if his right to that particular relief should fail to be

8. "In tender consideration whereof, and being without remedy save in a court of equity where matters of this kind are only and properly cognizable" (jurisdictional clause), "your orator prays that the said A., B., C. and D., be made parties defendant to this bill, and may answer the same, and every allegation thereof, on oath, as fully and particularly as if the same were here repeated, and they were thereunto particularly interrogated"—(or, if answers under oath are not desired, "may answer the same, but not under oath—the plaintiff expressly waiving answers under oath").

9. See Equity Rule 25 (5).

established under the law and the evidence, then that the court may grant other consistent relief, naming it.¹⁰

§ 95. (8c) The same—prayer for general relief.—It sometimes happens that after having stated a case proper for equity cognizance, the bill fails to ask for specific relief, or mistakes the nature of the relief properly applicable to the case made in the bill—or, again, the proofs fail to establish plaintiff's right to the specific relief prayed.

To meet such a situation, it is customary for the plaintiff, immediately following the prayer for specific relief, to insert a prayer for *general* relief—"and for such other relief as to equity may seem meet and the nature of the case require."

Under the prayer for general relief the court may grant any relief to which the material facts and circumstances put in issue by the bill, and sustained by the proofs, entitle the plaintiff. But such relief must be consistent with the case made.¹¹

§ 96. (8d) The same—illustrations.—Thus, under a bill brought to *rescind* a contract for fraud, the plaintiff cannot have *specific enforcement*, under the prayer for general relief—because of the inconsistency of the two kinds of relief.¹²

In *Smith v. Smith*¹³ the bill, though stating a good case, failed to ask for any relief, general or special. It was held that by filing an answer to the merits, without objection, the defendant waived the irregularity, and appropriate relief was granted.

10. *Tennant v. Dunlop*, 97 Va. 235; *Baker v. Berry Hill Co.*, 109 Va. 776; Equity Rule 25 (5). Thus, in a suit for specific performance of a contract to convey real property, wherein the bill sets up an apparent deficiency of acreage, the prayer may be for specific performance as to the whole acreage if to be had, or, if not, that the contract be enforced to the extent of defendant's ability, and compensation be made for the deficiency. So, relief may be asked against A., if he authorized B. to collect certain money, or against B., if he collected it without A.'s authority. *Thomason v. Smithson*, 7 Port. (Ala.) 144.

11. See *McGowan v. Parish*, 237 U. S. 285; *Hurt v. Jones*, 75 Va. 341, 352.

12. *James v. Bird*, 8 Rand. 510.

13. 4 Rand. 95.

In *Beall v. Silver*¹⁴ the prayer for special relief omitted to ask for interest on the principal of the debt asserted. Interest was allowed under the prayer for general relief.

In *Evans v. Roanoke Savings Bank*¹⁵ the prayer for specific relief sought the setting up and enforcement of a deed of trust, which the grantor had fraudulently procured to be released. But as the rights of a *bona fide* holder had, in the meantime, attached, so that the specific relief prayed for could not be granted, a personal decree for the debt was entered against the fraudulent debtor, under the prayer for general relief.

§ 97. (8e) Prayer for process—in Federal courts.—By the original practice of the High Court of Chancery in England, and inferentially by rule in the Federal courts,¹⁶ the bill must contain a prayer for process.

§ 98. (8f) The same—in Virginia.—We have already seen that according to the practice in Virginia, original process is usually issued before filing of the bill. Hence the prayer for such process is useless, and rarely found in bills filed in the Virginia courts.

§ 99. (9) Bills continued—the conclusion.—By long custom, bills conclude with the enigmatic phrase "And your orator will ever pray, etc."¹⁷

14. 2 Rand. 401.

15. 95 Va. 294.

16. Equity Rule 12.

17. The modern phrase is an evolution from ancient forms, some of which are subjoined. See IX Notes and Queries, 184:

"And your said almoner shall pray unto Almighty God for the prosperous state of your Majestie, according to his most bounden duty, in most high honor and felicity long to reign over us."

"And your said suppliant shall daily pray unto God for your Highness' prosperous estate in royaltie long to reign."

"And your said subject shall daily pray to God for the prosperous estate of your Majestie's Rayne."

"And your said humble subject shall duly pray to God for the

§ 100. (10) Bills continued—signature of counsel.—The rule of the chancery courts requires bills, as all other pleadings, to be signed by counsel. Such signature identifies the counsel with the cause, for the information of the court and its officials, and of adversary counsel. The signature is also taken to be, in a sense, a pledge of counsel's good faith in bringing the suit, or filing the pleading, and is supposed to be a safeguard against scandalous or other impertinent matter in the bill.

§ 101. (10a) The same—Federal court rule.—In the Federal courts the rule is that all pleadings shall be signed "individually by one or more solicitors of record"—that is, by counsel who have been admitted to practice in the court in which the pleading is filed—"and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay."¹⁸

§ 102. (11) The same—affidavit to bill.—The general rule is that unless required by statute in certain statutory proceedings, bills in chancery are not required to be sworn to.

§ 103. (11a) Affidavit to bills—exceptions.—Two prominent exceptions to this rule obtain, namely, (a) *Bills seeking ex parte action* by the court (*e. g.* a preliminary injunction), where the allegations of the bill are not *prima facie* established by documentary or other evidence accompanying the bill. The reason for requiring an affidavit in this instance, is obvious; and (b) *Bills for discovery and legal relief*—that is, where the sole

preservation of your Highnesse in all felicitie most happily long to reigne."

"And your said supplyant shall daily pray for your honor."

"And your supplyant as nevertheless by duetie bounden shall daily pray to God for the increase of your Honour."

It is evident, as suggested by the compiler, that the "etc." may be filled up according to individual fancy.

18. Equity Rule 24.

ground of equity jurisdiction is the needed discovery from the defendant—the controversy being one otherwise remediable at law—and the court of equity is asked to retain the cause and administer *legal relief*. Here the affidavit is required as a pledge of good faith on the part of the plaintiff, and to prevent a fraud on the equity jurisdiction.¹⁹

We shall see something more of these two classes of bills hereafter.

2. General Characteristics of Bills.

§ 104. General features.—In addition to the characteristics of the bill already mentioned, looking chiefly to the statement, in substance, of a proper case for the interposition of equity, there are numerous rules and customs observed by careful and informed lawyers in draughting bills—some of which rules are of mandatory character, and for the breach of which a demurrer may be interposed. Most of these rest in common sense, and the young practitioner possessed of this saving grace would follow them intuitively.

§ 105. The same—facts not mere legal conclusions should be stated.—Thus, it is improper to allege legal conclusions instead of the facts from which such conclusions are drawn. For example, if defendant is sought to be charged as trustee for the plaintiff, the circumstances giving rise to the trust must be alleged; so, if the purpose of the bill is to have a deed set aside for the fraud of the defendant, or because the contract was tainted with usury or illegality, a mere allegation that the transaction was fraudulent, or usurious, or illegal, without the facts constituting the fraud, or usury, or illegality, would be insufficient.

§ 106. The same—arguing the case in the bill—reciting evidence, etc.—It is bad form to anticipate the argument at the hearing,* by making use of the bill for that purpose. It is an established rule of equity pleading that "*the case must not*

19. Affidavit seems also proper in the case of bills to perpetuate testimony (*post*, Ch. xi), and bills of interpleader.

be argued in the bill." Nor should the bill recite mere matters of evidence. But where the evidence is of a documentary character, and the documents are filed with the bill, it is often proper, and sometimes necessary for purposes of a clear statement, to make specific reference to such evidence. But if plaintiff charge defendant with fraudulent representations, and asks rescission of the contract, it would be highly improper to allege in the bill that A., a third party, was present and heard the misrepresentation. The proper method is simply to charge the misrepresentation, with the accompanying facts, and to establish the allegation by introducing A. as a witness at the proper time.²⁰

20. See Equity Rule 25—"a short and simple statement of the *ultimate facts* * * * omitting any mere statement of evidence."

CHAPTER XI.

THE BILL—CONTINUED.

ORIGINAL BILLS NOT PRAYING RELIEF.

§ 107. **Bills not praying relief.**—Examples of such bills are few. The leading instances are:

- (1) Bills to Perpetuate Testimony, and
- (2) Pure Bills of Discovery.

§ 108. (1) **The purpose of the first** is to seek the aid of the court in taking and preserving the testimony of certain witnesses for use in future litigation should it arise—the plaintiff fearing the loss of the testimony by death of the witnesses or otherwise.¹

§ 109. (2) **The object of the second**—the pure bill of discovery—is to compel the adversary to disclose facts material to the plaintiff's case in an *action at law*, pending or contemplated between the same parties; such a resort to equity being necessary by reason of the common law disqualification as a witness, of any party to the action—a rule which is enforced in equity as well as at law, save in the case of an answer in chancery.

The removal by statute, in all the states, of this disqualification, aided by statutes permitting interrogatories to be filed by either party, at law, has rendered practically obsolete the use of the pure bill of discovery.²

In neither of these cases, it will be observed, does the bill call upon the court to adjudicate any controversy between the parties—its purpose, in either case, being merely to *secure evidence* to be used at some future time, or in some other court. Hence the propriety of classifying them as bills Not Praying Relief.³

1. For a statutory substitute, see Va. Code § 3369.

2. See Va. Code §§ 3345, 3370-3372.

3. For further details, see Story, Eq. Pl. 300 *et seq.*

§ 110. Pure bill of discovery—continued.—A pure bill of discovery seeks no relief in consequence of the discovery. It is used in aid of the jurisdiction of some other court; as to enable the plaintiff to prosecute or defend an action at law, or any other legal proceeding of a nature merely civil, before a tribunal unable to compel a discovery on oath.⁴

The necessity for bills of this character grew out of the common law rule that a party to a judicial proceeding was not a competent witness. To prevent a failure of justice, equity permitted either party to an action at law to secure the testimony of his adversary by a bill of this character.

§ 111. The same—continued.—A bill of this nature must state the matter touching which a discovery is sought, the interest of both plaintiff and defendant in the subject, and the right of the former to require the discovery from the latter.

Such a bill requires no affidavit, nor is it needful that the discovery should be indispensable to the party's case. He is entitled to it if he states and shows that it is material evidence, although merely cumulative.⁵

If, however, the bill is not a pure bill of discovery, but asks for *legal* (as distinguished from *equitable*) *relief*, it must appear by affidavit that the discovery is essential to the plaintiff's case.

§ 112. The same—discovery from corporation.—As a corporation cannot answer under oath, a pure bill of discovery cannot be maintained against a corporation as sole defendant. The proper practice is to make some officer of the corporation, supposed to be familiar with the facts, a co-defendant, and ask for discovery from him.⁶

§ 113. The same—modern disuse of such bills—statutory substitutes.—Bills of discovery are now with us, in large

4. Story, Eq. Pl. §§ 311 *et seq.*; article by Judge Lamb, 7 Va. Law Reg. 107.

5. *McFarland v. Hunter*, 8 Leigh 489, 492-494; 1 Story, Eq. Jurisp. 64k-74e; 2 Id. 1483.

6. *Roanoke Street R. Co. v. Hicks*, 96 Va. 510.

measure, superseded in practice by two statutory provisions, one allowing a court of law to compel a discovery upon oath, in answer to interrogatories filed, wherever it would be compelled upon a bill for discovery, if the interrogatories have not been unreasonably delayed;⁷ and the other declaring parties to suits, with some important qualifications, to be competent to give evidence on their own behalf, and to be competent and compellable to attend and give evidence on behalf of any other party to the proceeding.⁸

The statute, however, still preserves the right of any party to file a bill of discovery, instead of interrogatories.⁹

§ 114. Bill for discovery and legal relief.—After equity had assumed jurisdiction of pure bills of discovery, as explained in the foregoing sections, it went a step further, and assumed jurisdiction to retain the case and dispose of the whole controversy, even to the administering of *legal relief*.

This jurisdiction is not exercised in every case, but only in those cases where the *discovery is essential* to prove the case, or establish the defense, of the plaintiff in the bill, and where equitable remedies are appropriate for the relief sought. Inasmuch as the plaintiff is driven into equity by the necessity for discovery, equity, in accordance with its custom of giving complete relief, when once it has assumed jurisdiction for any purpose, may retain the bill, not only for purpose of *discovery* but for *relief* as well—though the case be otherwise one involving legal rights only.¹⁰

§ 115. The same—affidavit to bill.—In a bill of this nature, the plaintiff must allege the necessity for the discovery,

7. Va. Code §§ 3370-3372.

8. Id. §§ 3345-3351.

9. Id. § 3372.

10. Few questions of equity practice have evoked a greater divergency of views than the circumstances under which equity will administer legal relief because of having jurisdiction for purposes of discovery. Hence the bare outline here is offered with diffidence. The question has received an elaborate, if inconclusive, examination in 1 Story, Eq. Jurisp. 64k-74c; 2 Id. 1480-1504; Story, Eq. Pl. (10th ed) 288; *infra*, §§ 197-201.

and, as an earnest of good faith, and to prevent a fraud on the equity jurisdiction—since the case is one otherwise proper only for a court of law—the plaintiff must make affidavit to the bill.¹¹

CHAPTER XII.

BILLS NOT ORIGINAL.

1. SUPPLEMENTAL AND AMENDED BILLS.

§ 116. **Supplemental bills.**—A supplemental bill, as its name indicates, is a bill filed to supplement the original bill, where, by reason of facts occurring *since the original bill was filed*, new allegations, or new parties, or a new form of prayer for relief, are made necessary.

Thus, where, subsequent to the filing of the original bill, inchoate or contingent interests involved in the suit have, by death or otherwise, become vested; or, where such interests have, by the occurrence of new facts, devolved upon other persons, such enlarged interests or new parties should be brought before the court by a supplemental bill. In short, for practical purposes, we may describe a supplemental bill as one to supplement an original bill which was *sufficient at the time of its filing*, but which has since become insufficient by the occurrence of new facts materially altering the original situation.¹

§ 117. **Amended bills—two functions.**—An amended bill (closely akin to, but not to be confounded with, the supplemental bill) has two functions in the equity procedure. One of these is to correct *inherent imperfections* in the original bill, not due to subsequent occurrences; and the other, to serve the

11. 3 Pomeroy, Eq. Jurisp. 1415; Fletcher, Eq. Pl. & Pr. 811; Story, Eq. Pl. 288.

1. Fletcher, Eq. Pl. & Pr. 385, 825; Story, Eq. Pl. 33; 1 Barton, Ch. Pract. 106; Wilson v. Wilson, 93 Va. 546; Glenn v. Brown, 99 Va. 222, 326-327; Bibb v. American, etc., Co., 109 Va. 261.

purposes of a *special replication* to the plea or answer. These functions are more fully explained in the sections following.

§ 118. **The same—first function.**—As indicated, one of the uses of the amended bill is to correct imperfections in the original bill (in this aspect performing practically the office of the supplemental bill, except that the former has relation to imperfections inherent in the bill when filed), or to introduce essential additional facts which were then in existence.

In brief, an amended bill is one whose purpose is to incorporate some change in an original bill *insufficient for complete relief in its original structure*.²

§ 119. **Amended bills continued—second function.**—A second important office performed by the amended bill is to take the place of a special replication to the plea or answer—special replications being no longer used in the equity practice. This happens when it becomes necessary for the plaintiff to set up *new matter* in response to a defense asserted in the plea or answer.

For example: If the defendant should in his answer set up the defense of infancy, and the plaintiff relies upon a ratification after full age (which he might have alleged in his original bill but did not), instead of filing a special replication setting up such ratification (as he would do at law) it would be necessary for the plaintiff to file an amended bill, with this allegation inserted.³

§ 120. **Amendment of bills—freely allowed.**—Courts of equity are extremely liberal in permitting the plaintiff to amend his bill, whenever this seems necessary to bring the substantial merits of the case properly before the court. The granting of leave to amend is in the discretion of the court, and is not demandable as a matter of right—but the practice of the courts is so liberal in this respect that instances of unjust decrees flow-

2. See authorities *supra*.

3. See *Simmons v. Simmons*, 33 Gratt. 451, 458.

ing from mere slips in pleading are as rare in equity as they are common at law.⁴

§ 121. The same.—The circumstances under which amendments are allowed or disallowed, are well stated in the case of *Hardin v. Boyd*.⁵

“In reference to the amendments of equity pleadings,” says Mr. Justice Harlan, in that case, “the courts have found it impracticable to lay down a rule that would govern all cases. This allowance must, at every stage of the cause, rest in the discretion of the court; and that discretion must depend largely on the special circumstances of each case. It may be said generally that in passing upon applications to amend, the ends of justice should never be sacrificed to mere form, or by too rigid an adherence to technical rules of practice. Undoubtedly great caution should be exercised where the application comes after the litigation has continued for some time, or when the granting of it would cause serious inconvenience or expense to the opposite side. And an amendment should rarely, if ever, be permitted where it would materially change the very substance of the case made by the bill, and to which the parties have directed their proofs.”

§ 122. The same—in the Federal courts.—The new Equity Rules make most liberal provision for amendment of any pleading or record—the language of the rule being that “the court may at any time in furtherance of justice, upon such terms as may be just, permit any *process, proceeding, pleading or record* to be amended, or material supplementary matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.”⁶

4. See *Kelly v. Gwatkin*, 108 Va. 6; Equity Rules 19, 28; Va. Acts 1914, p. 641.

5. 113 U. S. 756.

6. Rule 19. See also Rules 28 and 34, both adopted in furtherance of the policy of liberality in the amendment of pleadings.

§ 123. The same—making new case by amendment.—

In amending his bill, the plaintiff must be careful not to so alter the frame of his bill as to make an *entirely new case*—that is, a case which cannot be made to harmonize with that made in the original bill.

The test, as stated by Keith, P., in *Pettyjohn v. Burson*,⁷ by which to determine whether the proposed amendment is proper, is to consider whether its purpose is to supplement some mistake or omission "*connected with the substance of the case, but not forming the substance itself*," or whether there is an abandonment of the entire case made by the original bill, and the assertion of a new and different case by amendment.

The decisions on the subject, however, involve distinctions so nice that the student must be content with the general principle, and study its application as need arises.⁸

§ 124. The same—leave to file.—As already stated, regularly an amended or supplemental bill can only be filed by leave of court. But in Virginia it is provided by statute,⁹ that the plaintiff "*may of right amend his bill before the defendant's appearance, and, notwithstanding such appearance, a plaintiff in equity may, at any time in the vacation of the court wherein the suit is pending, file in the clerk's office an amended or supplemental bill, or bill of revivor; whereupon the same proceedings may be had as if leave to file it had been previously obtained in court; but the court, on motion of a defendant, made at the term to which process to answer the same is returned executed on him, or, if it be returnable to rules, at the first term after it is so returned, may dismiss such amended or supplemental bill, or bill of revivor.*"

7. (Va.) 22 S. E. 508.

8. See 5 Va. Law Reg. 411; 8 Id. 437; n. 50 Am. St. Rep. 737; n. 16 C. C. A. 508; *Whalen v. Gordon*, 95 Fed. 305; *Belton v. Apperson*, 26 Gratt. 207; *Ewing v. Ferguson*, 33 Gratt. 548; *Straughn v. Hallwood*, 30 W. Va. 274, 8 Am. St. Rep. 29.

9. Va. Code, § 3253; *Holland v. Trotter*, 22 Gratt. 139. For the rule in the Federal courts, see Equity Rule 28.

§ 125. Proceedings on amended bill.—Subject to the statutory proceedings mentioned in the last section, when an amended bill is filed process (unless waived by consent) is issued thereon against all the defendants named therein, and the cause is matured on the amended bill substantially as if it were an original bill.¹⁰

§ 126. Error in naming a pleading.—In connection with the close distinction between the amended and the supplemental bill, it may be well at this juncture to point out that in equity pleading, the name or designation of a particular pleading plays a much less important part than at law. In equity, *substance* is regarded rather than *form*. Hence, though a pleader may mistake the *name* of his pleading, yet, if it be proper in substance, the court will disregard the error and treat the pleading as if it were rightly named. For example: If a supplemental bill be proper, but the plaintiff files what he terms an “amended” bill, or a “bill of revivor,” or a “cross-bill;” or if he term his pleading a “petition” when it should be an “answer,” or *vice versa*—and the pleading be sufficient in substance,—the court will treat it as if it had been properly designated.¹¹

2. THE CROSS-BILL.

§ 127. The cross-bill.—The cross-bill, as its name indicates, is a bill filed by one or more *defendants* against one or more of the plaintiffs in the original bill, or against one or more co-defendants, or against some or all of both plaintiffs and co-defendants.

The purpose of such a bill is not, in general, to repel the plaintiff's claim, but is rather to obtain *affirmative relief* on be-

10. As to new parties by amendment, see *Coffman v. Sangston*, 21 Gratt. 263. As to answer to amended bill, see Equity Rule 32.

11. See *Kendrick v. Whitney*, 28 Gratt. 646, 654-655; *Simmons v. Simmons*, 33 Gratt. 451, 458; *Whitten v. Saunders*, 75 Va. 563, 572; *Glenn v. Brown*, 99 Va. 322.

The new Federal Equity Rule in terms declares that “unless otherwise prescribed by statute or these rules, *the technical forms of pleading in equity are abolished.*” Rule 18.

half of the defendant filing the cross-bill. In short, it is rather a sword than a shield.

A simple illustration of the function of such a bill may be taken from a divorce suit, where the defendant consort, not content with a mere defense of the charges made in the bill—a defense which, if established, would call for a dismissal of the bill—files a cross-bill setting up matrimonial delinquencies on the part of the plaintiff consort, and asking a divorce to the defendant on the grounds so set up.

So, where one co-tenant files a bill for partition against his co-tenants, any of the latter may file a cross-bill against him, or any co-defendant, or against both, asking for an account of rents and profits received by the latter.

Again, in a suit for specific performance, if defendant desired to have the contract rescinded, he would file a cross-bill, setting up the grounds relied on for rescission.

So, when discovery was an important branch of the equity jurisdiction, a defendant might (as he still may) obtain discovery from the plaintiff or a co-defendant by means of a cross-bill.¹²

§ 128. The same—new matter—new parties.—As the cross-bill is auxiliary to the proceeding in the original suit, and to a large extent a branch or dependency of that suit, so that the two constitute practically a single suit, it is not permissible, as a general rule, to introduce new parties, or new and distinct matter not germane to the matter embraced in the original suit—unless the new matter has arisen since the filing of the original bill.

If new parties are essential to doing complete justice in the case they should be introduced rather by *objection to the original bill* for defect of parties, thus compelling the plaintiff to amend his bill and bring in the new parties. If, however, the pleadings and proofs indicate the necessity of a new party, and

12. See generally on the subject of the cross-bill: *Hudson v. Hudson*, 3 Rand. 117; *Moorman v. Smoot*, 28 Gratt. 80; *Derbyshire v. Jones*, 94 Va. 140.

the introduction of such party by amendment of the original bill be impracticable, such new party may be introduced by making him a party to the cross-bill;¹³ though the better practice would be for the defendant, in such case, to file a new bill, and ask that it be heard along with the pending cause.

§ 129. The same—effect of dismissal of original bill.

—Whether the dismissal of the original bill will carry with it the dismissal of the cross-bill depends on the particular circumstances of the case.

Thus, where the original bill is dismissed as to a particular defendant on the ground that he is not a proper party, the dismissal of the cross-bill as to him necessarily follows, since the latter bill can be maintained only against a proper party to the original bill.¹⁴

But where the cross-bill asserts an affirmative right in opposition to the plaintiff in the original bill, and not merely by way of defense, a right which is not adjudicated in the dismissal of the original bill,—the court may retain the cross-bill and proceed to a final decree thereon, regardless of the dismissal of the original bill.¹⁵

§ 130. The cross-bill continued—leave to file.—By the better practice, leave of court to file the cross-bill should first be obtained,¹⁶ though in many jurisdictions previous leave is not considered necessary, and an objecting party may assert his objection to the case made in the cross-bill by demurrer.¹⁷

13. *Derbyshire v. Jones*, 94 Va. 140; *Crockett v. Woods*, 97 Va. 391; *Shields v. Barrow*, 17 How. (U. S.) 145; *McMullen v. Eagan*, 21 W. Va. 250.

14. *Derbyshire v. Jones*, 94 Va. 140; *Sulphur Mines Co. v. Boswell*, 94 Va. 480.

15. *Ragland v. Brodnax*, 29 Gratt. 401; *Equitable Life Soc. v. Wilson*, 110 Va. 571; *Abels v. Planters, etc., Ins. Co.*, 92 Ala. 382, 9 So. 423; *Pethel v. McCullough*, 49 W. Va. 520, 39 S. E. 199; *Sigman v. Lundy*, 66 Miss. 522, 6 So. 245; *Fletcher, Eq. Pl. Pr.* 918.

16. *Bronson v. La Crosse R. Co.*, 2 Wall. 283; *Finlayson v. Lipscombe*, 16 Fla. 751; *Baker v. Oil Trust Co.*, 7 W. Va. 454.

17. *Neal v. Foster*, 34 Fed. 496; *Davis v. American, etc., Union*, 100 Ill. 313; *Story, Eq. Pl.* 632; *Fletcher, Eq. Pl. & Pr.* 899.

§ 131. The same—process and procedure.—On the filing of a cross-bill, process is issued against the defendants named therein, and the suit is matured as if it were an original proceeding. Defense may be made by demurrer, plea or answer.

As a rule, defendants in the original bill are required to answer the original bill before the defendants in the cross-bill can be required to answer the latter—a practice sanctioned by statute in Virginia.¹⁸

§ 132. Answer treated as a cross-bill.—It not infrequently happens that a defendant has in his *answer* set up a claim which regularly should have been asserted by *cross-bill*. In such case the court may, in its discretion, treat the answer as a cross-bill, in order to do complete justice between the parties.¹⁹

§ 133. The cross-bill—abolished in the Federal courts.—The new Equity Rules seem to have *abolished cross-bills*. Rule 30 declares that the answer “must state in short and simple form any *counter-claim* arising out of the transaction which is the subject-matter of the suit, and may *without cross-bill* set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim so set up shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and the cross-claims.”²⁰

3. THE PETITION—INTERVENTION.

§ 134. The petition.—While strictly speaking a petition is not a bill, the two pleadings are of a sufficiently kindred nature

18. Va. Code § 3254.

19. *Mettert v. Hagan*, 18 Gratt. 231; *Tate v. Vance*, 27 Gratt. 571; *Martin v. Kester*, 46 W. Va. 438, 33 S. E. 238. Of course in such case the adverse parties to the cross-claim would have the right to answer the new matter set up in defendant's answer, as if the latter were in fact a technical cross-bill.

20. Rule 31 provides for an answer by the adverse parties to the cross-claim asserted in the defendant's answer.

to justify the classification of the petition with Bills Not Original.

§ 135. The same—by whom filed.—While the books on equity pleading usually assert that a petition may be filed either by one who is a party to the cause,²¹ or by a stranger who desires to become a party by intervention, the cases in which petitions are filed by a party to the suit are so rare as not to need our special attention here.

The petition, as the term is used in ordinary practice, is a pleading, framed much like an original bill, *filed in a pending suit by one not a party to the proceeding, but who desires to become a party, in order to assert some right involved in the suit.*

Thus, if the estate of a decedent were being wound up in a chancery suit, the creditors of the estate who were not otherwise parties to the suit, might come in by petition, setting up their respective claims and asking that their claims be allowed and paid. So, if one of the legatees or distributees of the decedent should have assigned his interest, in whole or part, to a stranger, such stranger would come into the suit by petition, with the prayer that the assignment be recognized, and the claim paid to him.²²

§ 136. The same—leave to file.—A petition in a pending suit may be filed only by leave of court.

By statute in Virginia, however, such leave may be granted by the judge in vacation, and the petition may then be filed and matured in the clerk's office, as if it were an original bill.²³

§ 137. Process on filing the petition.—Aside from the statute just mentioned, regularly the petition is filed in court, on motion for leave to file; such leave being given, an order or *rule* is entered requiring the defendant or defendants therein named to appear on a day named, or within a designated time,

21. Fletcher, Eq. Pl. & Pr. 423. Petitions to rehear a cause are *sui generis*, and will be considered hereafter.

22. Equity Rule 37 provides for petition by intervenors.

23. Va. Code § 3233a. See also *id.* § 2460.

“to show cause, if any they have or can show, why the prayer of the said petition shall not be granted.”

A copy of this order is officially served on the defendants, and thereupon the case made by the petition is matured in court, by plea, answer, or demurrer of the defendants, as in the case of an original bill.²⁴

Where, as is sometimes the case, the petition is of such a nature that it may be granted as of course,—for example where its purpose is not hostile to the rights of any party to the suit—or where, in a creditors' bill, the petition sets up a debt which must later be proved before the master—process thereon may be dispensed with.²⁵

§ 138. The petition to rehear.—As its name indicates, the purpose of a petition to rehear is to seek the rehearing of some decree previously entered in the cause, and the correction of supposed errors therein. It is addressed, not to a higher court, but to the court in which the suit is pending. This proceeding will be noticed more at length hereafter.

4. THE BILL OF REVIVOR.

§ 139. Bills of Revivor.—The purpose of such bills is, as indicated by their title, to revive suits which, by reason of death or other disability of a party, such party is incapable of prosecuting or defending—and the purpose of the bill of revivor is to bring the legal representative of the deceased or disabled party before the court.

By the original equity practice, the circumstances essential to its maintenance were prescribed with some strictness, and the proceeding was somewhat technical.²⁶

24. Where the petition is filed in the clerk's office, under the statute mentioned in the last section, the process is a summons issued by the clerk on the order of the petitioner.

25. See generally on the subject of process on petitions, 8 Va. Law Reg. 96; Fletcher, Eq. Pl. & Pr. 425. See form of rule, in *Appendix, post*.

26. See these bills elaborately treated in Story, Eq. Pl. (10th ed.) 354-387.

However, under modern statutes, or rules of court, the bill of revivor has to a large extent been rendered obsolete by the substitution of simpler methods.²⁷

CHAPTER XIII.

BILLS NOT ORIGINAL.—CONTINUED.

5. BILL OF REVIEW.¹

§ 140. The bill of review.—The bill of review is a bill filed by some party to a pending chancery suit, for the purpose of having the trial court re-examine and correct or annul some previous decree in the cause, prejudicial to the rights of the plaintiff in the bill of review. Its purpose is somewhat similar to the writ of error *coram nobis* in the common law court.

§ 141. The same—grounds on which filed.—A bill of review may be filed on two grounds only, and only after the final decree in the cause, viz:

1. *Error of law on face of record; or 2. Newly discovered evidence; and, in either case, only after a final decree in the cause.*²

§ 142. The same—(1) error of law on face of the record.—A bill of review does not lie to review or correct errors of judgment in the determination of *facts*. If there be error in this particular, after a final decree, it can be corrected

²⁷. See Va. Code § 3308; *Wilson v. Smith*, 22 Gratt. 493; Equity Rules 35, 45.

1. Discussed at large, Story, Eq. Pl. (10th ed.) 403-425.

2. The books on equity pleading add the further essential that before a defendant is entitled to file a bill of review he must have *performed the decree*, or must allege his inability to do so. Story, Eq. Pl. 406, Fletcher, Eq. Pl. & Pr. 930. But it is confidently believed that such practice does not prevail in Virginia, nor in America generally.

only by an appellate court. But if error of *law* be apparent from an inspection of the record in the cause, and a final decree has been entered, a proper case for a bill of review is *prima facie* presented.

§ 143. The same—error of law continued.—It follows from what has been said that on a bill of review brought under this head, the sufficiency or insufficiency of the *proofs* cannot be considered. The decision of the court upon the *facts*, howsoever erroneous, is conclusive on a bill of review, and cannot be questioned.

As was said by Christian, J., in *Thompson v. Brooke*,³ quoted with approval in *Valz v. Coiner*,⁴ "It is well settled that a bill of review can only be brought upon two grounds—first upon newly discovered evidence, and second upon errors of law apparent upon the face of the record.⁵ * * * As to errors of law, they must be such as appear on the face of the decrees, orders and proceedings in the cause, arising on facts either admitted in the pleadings or stated as facts in the decrees. Such errors of law, and such only, may be corrected by a bill of review. But if the errors complained of be errors of judgment in the determination of the facts, these can only be corrected by appeal."

§ 144. The same—negligence of party or counsel.—Negligence, or mistake, or forgetfulness, or unskillfulness, of counsel in failing to introduce proper testimony, or properly to except to the master's report, are not sufficient grounds for filing a bill of review. In the footnote⁶ will be found cases il-

3. 76 Va. 160, 163.

4. 110 Va. 467, 469.

5. As to what is meant by errors of law "on the face of the record," see *Whiting v. Bank of U. S.*, 13 Pet. 6, 13-14; *Story*, Eq. Pl. 407.

6. *Ellzey v. Lane*, 2 H. & M. 593; *Jones v. Pilcher*, 6 Munf. 425; *Rawlings v. Rawlings*, 75 Va. 76; *Beatty v. Barley*, 97 Va. 11; *Sharp v. Shenandoah Furnace Co.*, 100 Va. 27; *Valz v. Coiner*, 110 Va. 467; *Phipps v. Wise Hotel Co.*, 116 Va. 739.

lustrating various grounds on which bills of review have been rejected.

§ 145. Bill of review continued—(2) newly discovered evidence.—The second ground on which a bill of review may be filed, is the discovery of *new evidence* since the decree complained of was entered,—evidence which *could not with reasonable diligence have been discovered before*, and of so material a nature that if it had been previously brought to the attention of the court its introduction would probably have altered the result. Evidence which is merely cumulative is not sufficient.⁷

§ 146. The same—after discovered evidence continued—practice.—A bill of review on the ground of the discovery of new evidence must distinctly and specifically state the character of the new evidence, and be accompanied by some *prima facie* proof that *such evidence exists*—either in the form of evidentiary documents or of affidavits of witnesses.

The rule here is well stated by Staples, J., in *Whitten v. Saunders*:⁸ “The rule,” says Judge Staples, “is that the court must, upon a mere inspection of the bill [of review], be able to see that the new matter discovered is of such a character that if brought forward in the suit it would have probably altered the decree; and it must be so stated that the defendant can answer understandingly, and thus present a direct issue to the court. It is not sufficient to allege that the party expects, to prove certain facts. He must *state the evidence distinctly upon which he relies, and must file the affidavits of witnesses in support of his averments.*”⁹

§ 147. Bill of review continued—leave to file.—No leave of court is required where such a bill is filed to review a

7. *Connolly v. Connolly*, 32 Gratt. 657; *Whitten v. Saunders*, 75 Va. 563; *Durbin v. Roanoke Building Co.*, 108 Va. 468; *Sutherland v. Gent*, 111 Va. 511.

8. 75 Va. 563, 573.

9. See also *Becker v. Johnson*, 111 Va. 245. The bill should also be accompanied by an affidavit of the plaintiff that the newly discovered evidence could not have been discovered earlier by the exercise of due diligence. *Story, Eq. Pl.* 412-413.

decree for *error of law*—but such leave is necessary where relief is sought on the ground of *after-discovered evidence*.¹⁰

§ 148. The same—why only after final decree?—Until a final decree and adjournment of the court for the term at which such decree was entered,¹¹ all the proceedings had in an equity suit are, in a measure, inchoate and interlocutory—or, in professional phrase, “in the breast of the court.” By this statement is meant, not only that the proceedings in the suit *at that term* are thus interlocutory, but that *all the proceedings, from the first decree onward*, though had or entered at former terms of the court, are likewise interlocutory and in the breast of the court. It is only after a *final decree and adjournment* that the proceedings in the cause crystalize, as it were, and present the elements of finality and rigidity characteristic of a judgment at law.

Where, therefore, *before final decree*, any material error is discovered in any decree in the cause—whether of law or of fact—or where new evidence is discovered—the court, on having its attention properly directed to the error or to the newly-discovered evidence, is free to hear the parties and to make such correction as justice demands. This is done by means of a *petition to rehear*, of which we shall see something hereafter. But where the proceedings have ceased to be interlocutory, by the entry of a final decree and adjournment of the court, then under the influence of the maxim *interest reipublicae ut sit finis litium*, the court feels less disposed to open up the litigation for the purpose of re-trial of the whole or any part thereof. Hence the establishment of the somewhat narrow and technical rules applicable to the bill of review already noticed.

10. This is the unwritten rule on the subject (2 Daniell, Ch. Pr. 1577), and is affirmed by the Virginia statute. Va. Code, § 3435.

11. It is common to find the rule stated in the books that the “enrollment” of the decree is the test of its finality. The term enrollment is derived from the ancient English practice which is explained in Story, Eq. Pl. (10th ed.) 403n (a), 421n (a). In the American practice decrees are treated as enrolled, in the English sense, only *after final decree and adjournment of the term*. See *Enrollment of Decrees*, post, §§ 241-243.

§ 149. The same—effect of final decree in a chancery cause.—The entry of a final decree in a chancery cause puts an end to any further proceedings in the cause—save proceedings to compel the performance of the court's mandate, or an appeal to a higher court; and if the decree directs that the cause "be stricken from the docket," as it usually does, the court is without power to take further proceedings therein. The court cannot on motion reinstate the cause for further proceedings; and, on the other hand, all prior proceedings, howsoever erroneous must stand, until altered or reversed by proper proceedings, namely, by *bill of review* in the same court, or by *appeal*.

As said by Burks, J., in *Battaille v. Maryland Hospital*,¹² "there are but two ways known to the law by which such a decree" [i. e. a final decree] "could be set aside—by bill of review in the court which rendered it, or appeal to this" [the appellate] "court."¹³

§ 150. The same—what is a final decree.—It is not always an easy matter to determine whether a particular decree is final or not—nor are the courts fully in accord as to the true characteristics of such a decree.

The following criterion, laid down by Baldwin, J., in *Cocke v. Gilpin*,¹⁴ has been approved in many cases:

"Where the further action of the court in the cause is necessary to give completely the relief contemplated by the court,

12. 76 Va. 63, 67.

13. In this connection see Va. Code § 3451, authorizing the correction of decrees *pro confesso*, and of certain clerical errors, by motion. See also Va. Acts 1899-1900, p. 582, permitting reinstatement on the docket for appointment of a commissioner to execute a deed in the place of a former commissioner who has died before executing a conveyance. The latter Act should be extended so as to cover all proceedings necessary to the complete execution of the decree.

14. 1 Rob. (Va.) 20, 28—quoted with approval by Burks, J., in *Rawlings v. Rawlings*, 75 Va. 76, 84. A decree of the court of appeals is always final (after lapse of the time permitted by its rules for a rehearing), whether the original decree appealed from were in itself interlocutory or final. *Matthews Co. v. Progress Co.*, 108 Va. 777.

there the decree upon which the question arises is to be regarded not as final but interlocutory. I say further action *in the cause*, to distinguish it from that action of the court which is common to both final and interlocutory decrees, to wit, those measures which are necessary for the *execution* of a decree that has been pronounced, and which are properly to be regarded as adopted not *in* but *beyond* the cause, and as founded on the decree or mandate of the court, without respect to the relief to which the party was previously entitled upon the merits of his case."

"A decree is not less final in its nature," says Burks, J., in *Rawlings v. Rawlings*,¹⁵ "because measures may be necessary to compel parties to obey it."

§ 151. The same—final decrees continued.—Prof. Minor¹⁶ describes a final decree as one "which disposes of the whole subject, gives all the relief that was contemplated, provides with reasonable completeness for giving effect to the sentence, and leaves nothing to be done in the cause save to superintend ministerially the execution of the decree."¹⁷

§ 152. The same—decrees final as to one party and interlocutory as to another.—A decree may be final as to one of the parties to the suit and yet interlocutory as to another—since, so far as the one party is concerned, his interest may be completely ascertained and the case disposed of as to him, and the cause be retained for further action as to the other.¹⁸

§ 153. Bill of review continued—time limitation.—In keeping with the sound policy of putting an end to litigation,

15. *Supra*.

16. 4 Minor's Inst. 1066, 1506.

17. See also *Repass v. Moore*, 96 Va. 147. The Federal courts, as well as many state courts, are somewhat more liberal in construing decrees as final. See *McGourkey v. Toledo, etc.*, R. Co., 146 U. S. 536; *Fletcher*, Eq. Pl. & Pr. 700.

18. *Royall v. Johnson*, 1 Rand. 421; *Ryan v. McLeod*, 32 Gratt. 367, 377; *Bradley v. Bradley*, 83 Va. 75; *Battaille v. Maryland Hospital*, 76 Va. 63, 71; *Jones v. Buckingham Slate Co.*, 116 Va. 120.

as exemplified in the strict rules governing the filing of bills of review, already noticed, the Virginia statute¹⁹ declares that "no bill of review shall be allowed to a final decree, unless it be exhibited within *one year* next after such decree," with a saving clause in favor of infants and lunatics.

The bill should show on its face that it is brought within the time prescribed by law, and it is not necessary that the defendants shall set up a plea of the statute of limitations thereto.²⁰

§ 154. The same—in the Federal courts.—The Equity Rules do not in terms mention bills of review, but the language of Rule 68, ostensibly providing for petitions for rehearing,²¹ clearly contemplates bills of review as well. Reference must be made to the rule itself for particulars.

§ 154a. Injunction with bill of review.—Where the bill of review is filed by a party whose rights may suffer detriment unless the effect of the decree be stayed or suspended until a hearing can be had on the bill of review, an injunction may be awarded suspending the decree accordingly.^{21a}

6. PETITION FOR REHEARING.

§ 155. Petition to rehear.—The purpose of a petition to rehear is much the same as that of the bill of review—namely, to have the trial court rehear the cause as to the particulars set out by the party complaining of error, and to correct the errors alleged.

§ 156. The same—contrasted with bill of review.—While the purposes of these two pleadings is substantially similar, as shown, there is wide variance in the scope of the two

19. Va. Code, § 3435.

20. *Shepperd v. Larue*, 6 Munf. 529. The considerations which should induce the court to grant or deny a rehearing or review, are stated at large by Story, J. in *Jenkins v. Eldredge*, 3 Story 299, quoted in Story, Eq. Pl. (10th ed.) 421n (a).

21. See *infra*, § 155.

21a. By declaratory statute in Virginia. Virginia Code, § 3435.

and in the circumstances under which they may be filed, respectively.

We have just seen that the bill of review lies only after a final decree, and only for the correction of errors of law apparent on the face of the record, or to introduce newly discovered and material evidence, and must be filed within one year from the date of the final decree.

On the other hand, a petition to rehear is the appropriate method of bringing errors to the attention of the trial court (1) *before* final decree; (2) whether the errors be of *law or of fact*; or (3) for the introduction of *newly discovered evidence*; nor, in Virginia, (4) is there any *statutory limitation* applicable to such petitions.

It thus appears that the courts are much more liberal in entertaining complaints of error in previous proceedings *before final decree*, presented by petition to rehear, than *after* the final decree, set up by bill of review.²²

§ 157. The same—interlocutory decrees in the breast of the court.—So long as no final decree has been entered, all the orders and decrees in a chancery suit are interlocutory, and therefore remain in the breast of the court, regardless of any adjournment of the term—herein presenting a striking contrast with the practice at law.

Being thus in the breast of the court, such decrees do not constitute final records; and hence they are subject to alteration and amendment, in the sound discretion of the court, at any future term and until the entry of the final decree. Hence, where considerations of justice require it, there is not the same reason for judicial reluctance to grant relief under a petition to rehear as in the case of the bill of review.²³

22. Where the error complained of is merely one of figures, or merely clerical, or of form, or otherwise of a simple nature, it may be corrected on mere *motion*. *Banks v. Anderson*, 2 Hen. & Munf. 20; *Kendrick v. Whitney*, 28 Gratt. 646, 652; 3 Daniell, Ch. Pr. 244. See Equity Rule 72.

23. See *supra*, § 148. See *Decrees, post*, Ch. xxi.

§ 158. Misnaming the petition to rehear as bill of review—or vice versa.—It has also already been pointed out ²⁴ that mere error in naming a pleading is immaterial in equity. Hence, where a pleading termed a “bill of review” is filed before final decree, it may be treated as a “petition to rehear,” or *vice versa*.²⁵

§ 159. Petition to rehear continued—time limit.—In the absence of a special statute, there is no prescribed limit of time within which such petition must be filed,²⁶ although, as in the case of a bill of review, the complaining party may be denied relief, where he has been guilty of laches in not bringing the error to the attention of the court at an earlier stage of the proceeding, and particularly where in the meantime other persons have changed their position in reliance on the correctness of the proceedings, and the parties cannot be placed *in statu quo*.²⁷

§ 160. The same—frame of the petition.—The petition should set forth specifically the errors complained of, and should conform, in its general structure, to the bill of review.²⁸ Indeed the petition to rehear appears to be the modern substitute for the practice of the English chancery of correcting errors in interlocutory decrees by “bill in the nature of the bill of a review”—though Judge Story suggests that the petition for rehearing cannot be resorted to where it is necessary to introduce supplementary matter, in which case, the new matter should

24. Ante, § 126; *Barger v. Buckland*, 28 Gratt. 851.

25. *Kendrick v. Whitney*, 28 Gratt. 646, 654; *Laidley v. Merrifield*, 7 Leigh 346; *Whitten v. Saunders*, 75 Va. 563, 572.

26. *Kendrick v. Whitney*, 28 Gratt. 646, 651-654,—a case in which it was held proper to entertain a petition to rehear a decree entered *thirteen years before*, and in which Judge Staples, who delivered the opinion, mentions cases in which rehearings were granted to correct errors occurring twenty-five years before petition filed.

27. See *Phipps v. Wise*, 116 Va. 739,—a case involving a bill of review, but equally applicable to the petition to rehear.

28. *Qu. vid., ante*, § 153. See also *McLeod v. New Albany*, 66 Fed. 378.

be brought to the attention of the court by supplemental bill in the nature of a bill of review, and not by petition.²⁹

§ 161. **The same—in the Federal courts.**—Rehearing in the Federal courts is provided for by Rules 67 and 72. Neither of these rules refers in terms to bills of review, but only to petitions to rehear. It is evident, however, from the language of Rule 68 that the term “petition to rehear” is not used in its technical sense, but is meant to include bills of review as well.

CHAPTER XIV.

DEFENSIVE PLEADINGS.

1. THE DEMURRER.

§ 162. **The function of a demurrer.**—The function of a demurrer in modern practice is to *test the sufficiency in law of the plaintiff's case as stated in the bill, or other pleading demurred to*. Its effect is much the same as at law, in that it admits the truth of all the facts sufficiently pleaded in the pleading demurred to, and submits to the court the decision of the issue whether the pleading *on its face*, is legally sufficient.

§ 163. **Failing to demur to a defective bill—effect.**—In equity, the failure to demur is nothing like so serious as at law, since, even though the defendant omits to demur, the court will not grant relief upon the hearing unless there be a proper case made by the bill and the proofs.¹ In short, where it appears that the case is without equity on its merits, the defendant may generally take advantage of the situation at the hearing, orally, or the court will *ex mero motu* raise the objection.²

§ 164. **The same—aided by proofs.**—But if the defective case made by the bill be afterwards supplemented by the proofs,

29. Story, Eq. Pl. 421, *et seq.*

1. *Green v. Massie*, 21 Gratt. 356.

2. *Stuart v. Coalter*, 4 Rand. 74, 78; *Salamone v. Keily*, 80 Va. 86; *Poindexter v. Burwell*, 82 Va. 507.

so that at the hearing the record discloses a meritorious case, consistent with that made in the bill, and one proper for relief in equity, the court may administer proper relief, and the defendant who has failed to demur to the bill cannot complain of such action.³

§ 165. The demurrer continued—to what pleading it lies.—In equity practice, a demurrer lies *only to a bill, cross-bill or petition*, or other similar aggressive pleading, and not to an answer or plea.⁴ As we shall see later, if the *answer* is insufficient in form, the proper proceeding is to *except* to it, or, if insufficient in *substance*, as a defense to the bill, the cause is *set down for hearing on bill and answer*; and if the *plea* be deemed insufficient, it is *set down for argument*.

§ 166. The same—effect if demurrer sustained.—Ordinarily, where a demurrer is sustained to the plaintiff's bill, he obtains leave, as of course, to amend his bill, and does amend accordingly, unless he has already put his best foot foremost and stated the case as strongly as the proofs at his command enable him to do; in which latter case, equally of course, an amendment would not serve his purpose, and his bill must be dismissed.

Formerly, if the plaintiff desired to test the validity of the court's ruling by an appeal, he must have refused to amend, and at once have taken an appeal, since, if he accepted the ruling as proper by amending his bill to conform thereto, he was held to have waived his demurrer, and could not avail himself of it in the higher court.⁵ But by recent statute this rather harsh rule no longer exists.⁶

3. *Salamone v. Keily*, *supra*.

4. See *Story*, Eq. Pl. 456; *Kelly v. Hamblen*, 98 Va. 383, 6 Va. Law Reg. 178, note; *Langdell*, Eq. Pl. 83, 94; 2 *Barton*, Ch. Pr. (2nd ed.) 370-371; *Banks v. Manchester*, 128 U. S. 244.

5. See *Fudge v. Payne*, 86 Va. 303; *Birckhead v. C. & O. Ry. Co.*, 95 Va. 648, 6 Va. Law Reg. 44; *Tidewater Railway Co. v. Hurt*, 109 Va. 204. Compare *N. & W. Ry. Co. v. Old Dom. Bag. Co.*, 97 Va. 90.

6. Acts 1914, p. 493.

§ 167. The same—objections that may be taken by demurrer.—As stated in a previous section, the purpose of a demurrer is to test the sufficiency *in law* of the adversary pleading as it stands on the record.

It follows that *any objection apparent on the face of the pleading* (and no other) may be thus taken.

It is impossible to enumerate the manifold errors that an ignorant and muddle-headed draughtsman may inject into his pleadings, hence a few practical illustrations of the more common grounds of demurrer must suffice.

§ 168. The same—illustrations of use of the demurrer.—Thus (hypothetically) where the plaintiff's bill for specific performance of a contract for the sale of personal property fails to allege that the property is of a unique character, not readily obtainable in the market, or such other circumstances as under established rules should induce a court of equity to decree specific performance of a contract for personal property; or where the bill sets up a trust for an illegal or unrecognized purpose; or seeks an injunction on improper grounds; or in a suit by creditors to set aside a fraudulent conveyance, omits to allege notice of the fraud by the grantee who has paid value—or to allege that the plaintiffs have recovered judgments at law (the rule is otherwise in Virginia);⁷ or, in a divorce suit, the bill fails to allege a valid marriage between the parties, or sufficient grounds for divorce; or in any other case where, *assuming all the facts stated in the bill to be true*, these facts yet do not constitute a case for the cognizance of equity—in all of such cases the objection is properly taken by demurrer.

§ 169. Further illustrations of objections taken by demurrer.—The illustrations given in the preceding section are rather objections of *substance*—where the bill failed in substance to make out a case entitling the plaintiff to equitable relief.

But there are many other objections besides those going to the substance of the case. Thus if the bill shows on its face that

7. See *Creditors' Bills*, *post* Ch. 31.

necessary parties have been omitted—that the plaintiff has *no real interest* in the matter he is attempting to litigate (as where an administrator sues for partition or sale of the real estate of his decedent—or for a sale of such real estate for payment of debts)—that the bill improperly joins two independent causes of action, resulting in multifariousness⁸—that though a good cause of action is stated, it is not a case proper for equity cognizance because of a plain, adequate and complete remedy at law—that the plaintiff, though having an interest, is yet not entitled to sue alone, by reason of some legal disability, as infancy or lunacy, shown in the bill—in all of which cases, *if the objection appear on the face of the bill* (but not otherwise), a demurrer is the proper method of bringing the objection to the attention of the court.

§ 170. Questioning the jurisdiction by demurrer.—If it appear on the face of the bill that the case is not a proper one for equity jurisdiction—that is, that *no court of equity* would have jurisdiction on the facts stated,—the question may be raised by demurrer, or, as we have already seen,⁹ the demurrer may be omitted and the attention of the court brought to the defect orally at the hearing, since no court of equity will assume jurisdiction of a suit not proper for its cognizance, even though no objection be made by the defendant. Neither waiver nor consent can confer jurisdiction.

§ 171. Defense of statute of limitations by demurrer—(1) remedy only affected.—While in a few states the statute of limitations may be availed of by demurrer, (that is, where the claim appears from the face of the bill to be time-barred), it is settled in Virginia and in most of the states, that even though the lapse of the prescribed period appear *from the face of the bill*, the statute *cannot be availed of by demurrer*, but must be set up by plea or answer—the reason being that the plaintiff would

8. *Supra*, Ch. viii.

9. *Ante*, §§ 12-13.

not, on the demurrer, have the opportunity of replying a new promise or other facts which repel the defense of limitation.¹⁰

§ 172. The same—(2) right affected.—As a rule, the statute of limitations does not bar the *right* but the *remedy* only. It merely shuts the doors of the court-house, as it were, upon the plaintiff when he seeks to enforce the right. The cause of action itself still exists, and is a valuable consideration for a new promise. The preceding section, in which is stated the rule that the statute of limitations cannot be set up by demurrer, contemplates a statute thus operating on the *remedy* only.

But now and then is met with a statute which, in terms or by construction, bars not the remedy only but the *right as well*—for example, where the right sought to be enforced is not one of the common law but is one given by statute, and by the terms of the same statute there is prescribed a limit of time within which the right must be enforced. In such cases it is usually held that *time is the essence of the right*, and that the right itself is barred after expiration of the limit fixed.

The action for wrongful death under Lord Campbell's Act, which the statute¹¹ requires to be asserted within one year—and mechanics' liens on real property to secure payment for improvements erected thereon, suits to enforce which are (in Virginia) limited to six months¹²—are illustrations of statutory *rights* to which a time limit is attached. In such cases, unless it appear from the plaintiff's declaration or bill that the suit was instituted within the prescribed time-limit, the defendant may avail himself of the defense by demurrer.¹³

§ 173. Demurrer—defense of statute of parol agreements—(1) where bill shows oral contract.—Where the bill

10. *Hubble v. Poff*, 98 Va. 646, 6 Va. Law Reg. 557, note.

11. Va. Code, § 2903.

12. *Id.*, § 2481.

13. See *The Harrisburg*, 119 U. S. 199; *Taylor v. Cranberry Iron Co.*, 94 N. C. 525; *Manuel v. N. & W. R. Co.*, 99 Va. 188, 6 Va. Law Reg. 776, note; *Lambert v. Ensign M'fg. Co. (W. Va.)*, 26 S. E. 451; 3 Va. Law Reg. 63; 6 *id.* 411, 558; 25 Cyc. 1398.

shows on its face that the contract sued on is not in writing, with no allegations to take the case out of the statute, the defendant may, on principle, and according to the better authority, avail himself of the defense of the statute of frauds by demurrer.¹⁴ Here the plaintiff admits, in most solemn form, that he lacks the statutory evidence, and that he is not entitled to enforce the contract against the unwilling defendant.

§ 174. The same—(2) where the bill sets up the contract in general terms.—Where, however, the bill sets out the contract in general terms, *without showing whether it is in writing or not*, a demurrer will not lie. Inasmuch as the statute of frauds does not render the oral contract void, but merely excludes the oral *evidence* of its existence, it is generally held that the plaintiff need not allege the writing in his bill or declaration. Here the question is one rather of *evidence* than of *pleading*. Hence it follows that the omission of such allegation does not render the pleading insufficient on its face.

In such case, the defendant (by the weight of authority) must deny the existence of the writing, in his plea or answer. In some jurisdictions, however, including Virginia, it is held that the defendant, instead of specifically pleading the statute, may avail himself of it by *objecting to the oral testimony* when offered—and in the absence of objection, either in his pleading or when the oral evidence is offered, he is held to have waived the defense.¹⁵

§ 174a. The demurrer in the Federal courts.—Along with other technical forms of pleading, the new Equity Rules have abolished the demurrer in terms—and defenses formerly made by demurrer are required to be made by *motion* or in the *answer*.¹⁶

14. 3 Cyc. 312.

15. *Eaves v. Vial*, 98 Va. 104. The authorities are collected in 20 Cyc. 308-311; 9 Enc. Pl. & Pr. 705-709. See 5 Va. Law Reg. 794.

16. Rule 29.

CHAPTER XV.

DEFENSIVE PLEADINGS—CONTINUED.

2. THE PLEA.

§ 175. **The Plea.**—Defense by plea, in modern times at least, is comparatively rare, although, where available, this form of defense has many advantages over that by way of answer—especially since the answer, by the operation of modern statutes, has been largely shorn of its old-time value as an instrument of evidence.

The defense by plea is used where the defendant desires to present a *single state of facts* (although made up of numerous circumstances), as a defense to the plaintiff's suit. The advantage which the plea has over the answer is that it shortens the litigation—reducing the issue, as it does, to a *single point*. It also saves the defendant from making discovery—the rule being that 'one who answers must answer fully'—although this immunity is now of little advantage.

Familiar illustrations of the use of the plea would be: The statute of limitations; absence of proper parties (where this does not appear from the bill itself); *res judicata*; usury; a release; an award; infancy; bankruptcy; denial of partnership; *bona fide* purchaser; denial of an essential jurisdictional fact alleged in the bill, etc.¹

§ 176. **Several pleas—duplicity.**—Under the general equity practice, it seems that the defendant is permitted, as a matter of course, to file different pleas to separate parts of the same bill, but he will ordinarily not be permitted to file several pleas to the *whole bill*, or to the same part thereof. This, however, the court may in its discretion permit.^{1a}

The Virginia courts are quite liberal in this connection, and are disposed to extend the statutory relaxation of the rule against

1. See form of plea, *post*, *Appendix*.

1a. See Fletcher's Eq. Pl. & Pr. 244-5; Shipman's Eq. Pl. 492.

duplicity in actions at law, to proceedings in equity, by analogy.² Thus it is common practice in Virginia to demur and answer at the same time.³ Inasmuch, however, as the purpose of the plea is to shorten the litigation by reducing the issue to a single point, and since the defense by plea is not the only defense open to the defendant, instances are rare in which occasion arises for the use of more than a single plea to the whole bill or to the same part thereof.

§ 177. Sufficiency of plea—how tested.—In a court of law the proper method of testing the legal sufficiency of any pleading is, of course, by demurrer. But, as has already been pointed out, in equity procedure the demurrer lies only to an aggressive pleading. Hence objection to a plea cannot be taken by demurrer.

Practically the same result is accomplished, however, by "*setting down the plea for argument*"—which means that before replying thereto the plaintiff invokes the opinion of the court whether the plea, assuming its allegations to be true, is sufficient in form and substance as a defense to the bill. Substantially, therefore, the only difference between a demurrer and a setting down for argument is one of terms only.⁴

§ 178. The same—result of hearing of the argument.—The result of this hearing will be, of course, a ruling either that the plea is or is not legally sufficient as a defense to the bill, or to that portion of the bill to which it purports to be a defense—with the results following:

§ 179. The same—(a) plea held insufficient.—If the plea is held to be no valid defense, it will be rejected by the court, or, in the language of the order, "disallowed"—and the defendant, both by the unwritten rule and by the statute, will be ordered to file an answer.⁵

2. Va. Code, §§ 3264, 3493.

3. *Bassett v. Cunningham*, 7 Leigh 402.

4. See Va. Code, § 3273, which seems declaratory of the unwritten rule.

5. *Ibid.*

§ 180. **The same—(b) plea held legally sufficient.**—If, on the other hand, the plea is held to be *sufficient*, then an order is entered “allowing the plea.” The plaintiff must then decide whether he can afford to take issue on it by filing a general replication, denying the truth of the allegations of the plea—as he must do if the plea merely denies the allegations of the bill, and is not by way of confession and avoidance—or whether he must not himself set up in reply new matter by confession and avoidance. In the latter case, by the ancient practice, the plaintiff filed a special replication. But, as already shown, special replications have long since become obsolete in the equity practice, and have been substituted by the amended bill.

§ 181. **The same—illustrations.**—Thus, for example, in a suit for divorce on the ground of the defendant’s unjustifiable desertion of the plaintiff continued during the statutory period, if the defendant by plea simply denies the desertion, the plaintiff has no other course open to him than to file a general replication, and thus take issue on the truth or falsity of the plea.

But if the defendant plead by way of confession and avoidance, by admitting the desertion and justifying it on the ground of the plaintiff’s adultery, here the plaintiff must decide whether he will deny the adultery (which he would naturally do if innocent, and which he would do by a general replication), or whether (if guilty) he must admit the adultery and avoid the effect of the admission by proving *condonation* on the part of the defendant. If the latter alternative be adopted, he must file an *amended bill*, reiterating the charge of desertion, admitting his own adultery, and setting up condonation by the defendant. Whether he shall adopt the one or the other method of defense will, of course, depend upon the proofs at his command, or the lack of proof available to the defendant.

§ 182. **The same—issue taken on plea.**—Where the plaintiff takes issue on the plea, by a general replication, he is entitled by the Virginia statute⁶ to have such issue tried by a

6. Va. Code, § 3274. Another instance occurs in an issue out of chancery, noticed hereafter.

jury—this being one of the few examples of a jury trial in a court of equity.

§ 183. The same—(a) issue on plea found for defendant.—If such issue be found in favor of the *defendant*—that is, that the plea is *true*—and the plea is to the whole bill, an order is entered *dismissing the bill*, with the result, of course, that the defendant wins the suit. If, however, the plea goes to a particular portion of the bill—as, for example, to only one of several claims—then such claim is adjudged in defendant's favor, and is eliminated from the controversy.

Thus, if the purpose of the bill be to enjoin defendant from cutting timber from a particular tract, and defendant by plea sets up a fee-simple title in himself, with general replication by the plaintiff, issue found for the defendant would necessarily call for ending the entire controversy by a dismissal of the bill, since the whole foundation of the plaintiff's suit has failed.

If, on the other hand, the bill had included two tracts, and defendant had pleaded title in himself as to one of the tracts only, issue found in defendant's favor would have eliminated the latter tract from the controversy, without touching the question as to the former.

§ 184. The same—(b) issue found for plaintiff.—If, under the circumstances mentioned in the last section, the issue had been found for the *plaintiff*, the result would not have been so determinative of the controversy—since the finding that the title was not in defendant would not necessarily imply that defendant had not in reserve other satisfactory defenses—as, for example, that in fact he had not been guilty of cutting the timber in question,—or that he had cut it under license from the owner—nor would it negative the possible existence of numerous other available defenses.

Hence, where the plea is thus found in the *plaintiff's* favor—that is, where the plea is found *untrue* in fact—such finding does not necessarily end the controversy, but the defendant has the privilege of making *other defenses by his answer*, filed after the decision on the plea. In short, the defendant in equity after having missed with his torpedo in the shape of a plea, may then fall back upon a broadside in the form of an answer.

In such case the finding that the plea is untrue becomes *res judicata*, and the same defense cannot again be asserted in the answer.

§ 185. Plea supported by answer.—It is possible for the plaintiff so to frame the allegations of his bill as to compel the defendant to file an answer along with his plea—the result being in the language of the books, ‘a plea supported by an answer.’ This somewhat rare specimen of pleading occurs where the plaintiff anticipates the defense to be set up by the defendant, and in the bill alleges matter in avoidance of such defense and *prays discovery* from the defendant as to the truth of such matter in avoidance.

Let us suppose, for example, that the bill alleges that the defendant was an infant when the contract sued on was made, but that he has ratified after attaining full age, and calls for *discovery as to such ratification*. Here the plea of infancy would raise no issue, since the infancy is admitted in the bill. The defendant might file a plea denying the ratification, but clearly this would not relieve him of the necessity of *answering* and thus making discovery as to the *ratification*. The defendant would be obliged, therefore, to support his plea by an answer.⁷

§ 186. Defense by plea—optional not obligatory.—Before passing from the plea it may be well to point out that, save as to matters in abatement, defense by plea is a privilege to be exercised by the defendant or not at his option. Any meritorious defense available by *plea* may be made by *answer* as well. In other words, there is no rule of equity procedure that certain defenses must be made by plea and certain others by answer. Hence, if he so choose, the defendant may utilize his answer for every meritorious defense open to him.⁸

7. See numerous illustrations, Story, Eq. Pl. 671-679.

8. A single exception to the rule thus broadly stated exists in the case where defendant desires to set up a privilege in avoidance of *discovery* sought in the bill. He cannot set up the privilege by *answer*, because of the rule that a defendant who answers *must answer fully*. Hence in such case he is driven to his plea. Thus, if discov-

§ 187. **Pleas in the Federal courts—abolished.**—By the New Equity Rules, pleas, whether in bar or in abatement, are abolished, and defenses formerly presentable by plea are required to be made by *motion* or answer.⁹

§ 188. **Plea of another pending suit—(1) in another court of equity.**—The plaintiff is not permitted to harass the defendant by two suits concerning the same subject-matter, whether both be in equity, or one at law and the other in equity.¹⁰

Hence where both suits are pending in equity, in the same state,¹¹ objection is properly made by filing, in the later case, a plea of former suit pending. If the plea is sustained an order follows, dismissing the later suit.¹²

§ 189. **The same—(2) another action pending in a court of law.**—It is clear that since a court of law does not recognize even the existence of a court of equity, no plea of a pending equity suit could be set up in abatement of an action at law. So that where there are two suits being prosecuted by the same plaintiff, against the same defendant, involving the same subject-matter, one at law and the other in equity, the objections must be made *in the equity suit*. This is done by a rule

ery is sought of privileged communications, or of matters the discovery of which would subject him to a penalty or forfeiture, the defendant must set up the privilege of non-disclosure by his plea (or demurrer if appearing on the face of the bill)—since if he answers at all he must answer fully. See Story, Eq. Pl. 847.

9. Rules 29, 45, 52.

10. The case of a mortgagee proceeding at law for a personal judgment for the debt, and in equity to foreclose the mortgage, is a striking exception. *Jones v. Conde*, 6 Johns. Ch. 77; *Priddy v. Hartsook*, 81 Va. 67.

11. Another suit pending in a *foreign state* is no valid objection. *Davis v. Morriss*, 76 Va. 21; *Stanton v. Embrey*, 93 U. S. 548; *Hatch v. Spofford*, 22 Conn. 485, 58 Am. Dec. 433—a case *at law*, in which a plea of a former suit in equity, pending in another state, was offered in abatement, but the opinion in which, by Ellsworth, J., contains a luminous exposition of the general topic of pleas of former suits pending, both at law and in equity.

12. *Fletcher*, Eq. Pl. & Pr. 258, 365; *Hatch v. Spofford*, *supra*.

against the plaintiff to show cause why he should not be put to an *election between the two suits*. If he fail to elect within the time prescribed in the order requiring an election, the suit in equity will be dismissed.¹³

CHAPTER XVI.

DEFENSIVE PLEADINGS—CONTINUED.

3. THE ANSWER.

§ 190. The answer in chancery.—The answer is the pleading by which the defendant sets up his defense, or defenses, at large, and in somewhat circumstantial detail. It is the most common method of making defense in chancery suits. As indicated in the preceding section, the answer (with immaterial exceptions) may be used for any defense or defenses available to the defendant.¹

§ 191. The same—both a pleading and an instrument of evidence.—The answer is unique in being the only pleading, at law or in equity, possessing *evidentiary value*. At law, the allegations of a declaration, or of a plea, or a replication, or other pleading—or the allegations of the bill, or of the plea in chancery—have no value whatsoever as evidence, but are mere statements of the plaintiff's claim, or of the defendant's de-

13. Fletcher, Eq. Pl. & Pr. 365; Gibbs v. Perkinson, 4 H. & M. 415; Williamson v. Paxton, 18 Gratt. 475, 504; Priddy v. Hartsook, 81 Va. 64, 69. The reason why the objection is made here by a *rule to elect*, rather than by a *plea* of the pending action at law, probably rests on the consideration that if set up by a plea, a decision on the plea in favor of the defendant would call necessarily for a dismissal of the plaintiff's bill, and force him to stake his entire reliance on the action at law—a result in conflict with the more gracious policy of the equity courts, which is not arbitrarily to dismiss the bill for this cause, but to permit the plaintiff to exercise his own option as to which of the suits he will abandon.

1. See form of answer, *post*, *Appendix*.

fense, to be supported later by such evidence as the parties may be able to produce at the trial.

But from earliest days it has been the settled rule of equity practice that the answer of the defendant must be under oath, and being under oath it is to be treated as of high evidentiary value.

1. *The answer as an instrument of evidence.*

§ 192. **Value of answer as an instrument of evidence**—(1) **in ordinary chancery cases.**—The uniform rule of the chancery courts is that the sworn answer of the defendant, *so far as it is responsive to the allegations of the bill* (and no further) is evidence in behalf of the respondent (but not of a co-defendant), of such weight that it may be overcome *only by the testimony of two witnesses*, or of one witness and corroborative circumstances, or other equivalent testimony.^{1a}

§ 193. **The same—reason for the rule stated.**—Commentators are not agreed as to the reason on which the rule stated rests, but that suggested by Chief Justice Marshall¹² seems quite satisfactory, namely, that “the plaintiff calls upon the defendant to answer an allegation he makes, and thereby admits the answer to be *evidence*. If it is testimony, it is equal to the testimony of any other witness; and as the plaintiff cannot prevail if the balance of proof be not in his favor, he must

1a. Story, Eq. Pl. (10th ed.) 849a, 875a; *Thornton v. Gordon*, 2 Rob. (Va.) 719; *Seitz v. Mitchell*, 94 U. S. 580. The rule does not apply where the statements of the answer are merely made on information and belief; nor where they are manifestly absurd, contradictory or impossible; nor where the answer is not direct and positive in its denials and explanations; nor where it appears that the defendant could have had no personal knowledge of the matters to which he swears; nor as to new matters stated in avoidance. 1 Story, Eq. Pl. (10th ed.) 849a (n); *Banks v. Manchester*, 128 U. S. 244; *East India Co. v. Donald*, 9 Ves. 275; *Town v. Needham*, 3 Paige 545; *Fant v. Miller*, 17 Gratt. 187. For rules governing the answer in the Federal Courts, see *infra*, § 207.

2. In *Clark v. Van Riemsdyk*, 9 Cranch 158, 160. See footnote to the section following.

have circumstances in addition to his single witness, in order to turn the balance."

§ 194. The same—waiver of the oath—the equity rule.

—While there is some lack of harmony among the authorities, the better rule is that, in the absence of an enabling statute, the plaintiff cannot deprive the defendant's answer of this evidentiary force, by waiving the oath in his bill.³

§ 195. The same—statutory waiver.—But in Virginia, and probably in most of the states of the Union, the plaintiff is now permitted by statute ⁴ to waive the oath in his bill, and thus deprive the answer of its ancient force—and, indeed, of all force as evidence. Where the plaintiff thus avails himself of the statutory privilege and waives answer under oath, the answer, whether sworn to or not, loses its evidentiary character and is relegated to the lower rank of a mere pleading.⁵

3. *Thornton v. Gordon*, 2 Rob (Va.) 719. "It has been argued," says Allen, Jr., in this case, "that the rule giving to the answer the weight of evidence arises from the right of the plaintiff to call for a discovery; that this is a right of the plaintiff and he may waive it. * * *" (But) "if this were the sole foundation of the rule, it would seem to follow that if, by calling upon the defendant to answer, the answer when made is admitted to be evidence of the fact, the plaintiff would be concluded by it.

"Perhaps the origin of the rule is to be found in the civil law, which required the evidence of two witnesses as the foundation of a decree. * * * To whatever source the rule is traced, it is firmly established as one of the fundamental principles of a court of equity. It is the law of the forum, and all who apply to it for relief must submit to have their causes tried according to its established modes of procedure." See also, *Jones v. Abraham*, 75 Va. 466.

4. Va. Code, § 3281. By the terms of the statute, the plaintiff may either waive oath as to the *entire answer*, or he may only require an oath as to certain *specified interrogatories* of the bill—in which latter case, the answer to these interrogatories would retain its former force as evidence.

5. This seems clear enough from the language of the statute, and this conclusion is confirmed in *Millhizer v. McKinley*, 98 Va. 207. The verified answer may of course still be used as an *affidavit*, whenever an affidavit is admissible as evidence—as, for example, on motion to dissolve a temporary injunction before final hearing. Va. Code, § 3281.

§ 196. The answer as evidence continued—(2) hearing on bill and answer only.—As will be explained later, where the plaintiff conceives that the answer sets up no valid defense, instead of demurring to it, as he would at law, the proper mode of testing the sufficiency of the defense asserted is to have the case *set down for hearing on bill and answer*—without any replication, and of course without the taking of testimony. By thus going to hearing on bill and answer, the plaintiff admits as true *all the allegations of the answer*—not only such as are *responsive* to the allegations of the bill, but even *new matter in avoidance* of the plaintiff's claims.⁶

This follows as a necessary consequence of the plaintiff's action in declining to file a replication, and thus precluding the defendant from the opportunity of offering testimony *dehors* the record. In other words, where the plaintiff thus sets the cause down for hearing on bill and answer only, he in effect admits all matters of fact well pleaded in the answer, and asserts that notwithstanding their truth they constitute no valid defense to the bill—thus substantially *demurring* to the answer.

§ 197. The same—in a court of law—in response to a bill of discovery.—Where the bill is filed merely to secure discovery to be used in a *pending action at law*, the court of law applies its own rules, and hence treats the answer, when introduced before the jury, as the evidence of a *single witness*. That is, the question of the weight to be given to the answer as evidence will be left to the discretion of the jury.⁷

§ 198. The same—answer to a pure bill of discovery, retained by the court of equity.—Where a bill of discovery is filed in aid of a pending action at law, and discovery is had, this ends the proceeding in the equity court, and the answer may then be used in the law court, with the effect as shown in the preceding section.

6. Perkins v. Nichols, 11 Allen 542; Fletcher, Eq. Pl. & Pr. 356; Story, Eq. Pl. (10th ed.) 456. See Tabb v. Cabell, 17 Gratt. 160; Cocke v. Minor, 25 Gratt. 246.

7. McFarland v. Hunter, 8 Leigh 489; Lyons v. Miller, 6 Gratt. 427; 7 Va. Law Reg. 108-110; Fletcher, Eq. Pl. & Pr. 820.

But, particularly where the action in the law court is merely contemplated or threatened,⁸ and the prospective plaintiff at law files a bill for discovery in aid of his action—or the defendant in aid of his defense, as he may do—the court of equity, in accordance with its policy of giving complete relief, and to prevent a multiplicity of suits, will sometimes retain the bill and proceed to give complete relief, though this be purely legal.⁹

§ 199. The same—in equity—to a pure bill of discovery, retained.—Where the cause is thus retained, and the discovery sought is obtained, it seems that the court gives the answer the same weight as a court of law would have given it—namely, as the testimony of a single witness.¹⁰

§ 200. The same—(a) no discovery obtained.—Where the plaintiff's demand is properly enforceable only *at law*, but the *necessity of discovery drives him into equity*, a court of equity, as we have already seen, may retain the bill and administer legal relief. Here, since the plaintiff must allege his inability to prove the allegations of his bill without the testimony of the defendant, and must make oath to his bill—one of the few cases where the oath is required—it follows that if the defendant, by his testimony, in the form of his answer to the bill, should *deny the allegations of the bill*, of course the bill must be dismissed. The question here is rather one of jurisdiction. If the plaintiff were allowed to dispute the truth of the answer, he would be *proving himself out of court*—because he is in court only on the ground that he is dependent upon the defendant's testimony, to prove his case. If he get no such testimony from the answer, then the jurisdiction of the court of equity is ousted, and the bill must be dismissed.¹¹

§ 201. The same—bill for discovery and legal relief—(b) discovery obtained.—If, in the case mentioned, the de-

8. 2 Story, Eq. Jurisp. 1483.

9. See *ante*, § 114, where reference is made to the distressing uncertainty in the practice in such cases.

10. See following section, note.

11. See this very much confused subject discussed by the late Judge Lamb, 7 Va. Law Reg. 107. See *supra*, § 114, note.

fendant *make the discovery called for*, it seems that that court will give the answer merely the same force as a court of law would have given it—namely, as equal to the testimony of a single witness.¹²

2. *How sufficiency of answer tested.*

§ 202. The answer continued—how sufficiency tested.

—As we have already seen,¹³ a demurrer does not lie to an answer, but only to an aggressive pleading. But if an answer set up a counter-claim, and is treated as a cross-bill,¹⁴ its sufficiency as to such counter-claim may be tested by a demurrer.

§ 203. The same—(1) answer insufficient in form.—

By insufficiency of form here is meant the failure of the answer, in its actual content, to conform to the rules of the forum—as, for example, because of evasiveness, failure to answer fully the allegations or interrogatories of the bill, absence of affidavit when required, etc.

Where such insufficiency appears, the plaintiff's objection is made by *excepting* to the answer, and in his exceptions distinctly stating the grounds of his objections.

It follows, then, that resort is had to exceptions *only when the plaintiff desires a more perfect answer*. If, on the other hand, the answer is merely insufficient *in law* as a defense to the bill, naturally the plaintiff will not desire a more perfect answer and thus give the defendant opportunity of setting up a better defense. In such case the plaintiff will proceed as indicated in the following section.¹⁵

12. *Supra*, § 197.

13. *Ante*, *The Demurrer*, Ch. XIV.

14. *Ante*, *The Cross-bill*, Ch. XII.

15. Langdell, Eq. Pl. 84; Fletcher, Eq. Pl. & Pr. 333; Story, Eq. Pl. 864-866; 4 Minor's Inst. 1427-1428; Va. Code, §§ 3276-3277; Coleman v. Lynn, 4 Rand. 454, 456. Compare Kelly v. Hamblen, 98 Va. 383, 391, where the court seems inadvertently to have confused *exceptions to answer* with *hearing on bill and answer*—an error repeated in several subsequent cases. See Keys, etc., Co. v. Kirkbridge, 114 Va. 58.

Exceptions to answers are abolished in the Federal courts, and are substituted by motions to strike out.¹⁶

§ 204. The same—(2) answer insufficient in substance.—As just mentioned, objections by way of *exception* to the answer, are not to fulfill the office of a demurrer, in raising the question of the sufficiency *in law* of the answer as an affirmative defense to the bill. If plaintiff desire to submit to the court the sufficiency of the answer *as a defense to the case asserted in the bill*, the proper method is to “*set down the case for hearing on the bill and answer.*” Here there is no replication filed, and therefore no opportunity for either party to take depositions. The effect of this is, of course, *to admit the truth of all matters of fact sufficiently pleaded in the answer*, whether responsive to the bill or whether in confession and avoidance, and to submit to the court the decision of the question whether, on the facts as they appear from the answer, the decree should not go in favor of the plaintiff.

In short, going to hearing on the bill and answer is, for some purposes, practically the same as a demurrer at law to a plea.¹⁷

Since this course on the part of the plaintiff excludes any opportunity on the part of either party to *take testimony*, there is good reason for the rule that the plaintiff thereby admits the truth of all facts set up in the answer relevant to the case stated in the bill.

§ 205. The same—hearing on bill and answer—continued.—This is a perilous proceeding, unless the plaintiff is sure that the admissions in the answer are sufficient to establish the material allegations of his bill—since, as already indicated, there is no opportunity in such a situation to introduce other evidence, and the entire answer, so far as relevant to the case made in the bill, is taken as true.

On such hearing, if the answer is held insufficient in law as a defense to the bill, the plaintiff is entitled to a decree. If, on

16. Equity Rule 33.

17. Story, Eq. Pl. 877; Fletcher, Eq. Pl. & Pr. 332, 677; Langdell, Eq. Pl. 83; 4 Minor's Inst. 1444; *supra*, § 196.

the other hand, the answer is held sufficient, the bill is dismissed.¹⁸ Hence the result is decisive for one or the other of the parties.

When the case is thus heard on bill and answer, it would seem to be immaterial *whether the answer is sworn to or not*—since, by so setting down the cause, the plaintiff admits the truth of the answer, to the extent stated.¹⁹

3. *Miscellaneous rules governing the answer.*

§ 206. The answer continued—allegations not answered.—The contrast between the practice at law and in equity is strikingly exhibited in the case where the defendant has failed to deny the allegations of the plaintiff's declaration and his bill, respectively.

The rule at law is that all allegations of the declaration not denied by the plea are taken to be admitted—while the rule in equity is precisely the reverse, namely, that allegations of the bill not denied or noticed in the answer are not taken to be admitted by the defendant, but, if material to the plaintiff's case, must be proved by independent testimony.

If the plaintiff desire to insist upon a response to such allegations he should except to the answer for insufficiency.²⁰

§ 207. The answer in Federal courts of equity.—The radical changes in the equity practice of the Federal courts are especially conspicuous in the rule governing the answer, which now becomes practically the *only pleading available to the defendant*. It is provided that every defense in *point of law* which was formerly the subject of demurrer or plea shall be made by

18. Langdell, Eq. Pl. 83; 2 Daniell, Ch. Pr. 1189; Fletcher, Eq. Pl. & Pr. 677; Cocke v. Minor, 25 Gratt. 246. Quære as to how plaintiff should proceed where the answer is *insufficient* as a defense to one part of the bill and *sufficient* as to another part?

19. Fletcher, Eq. Pl. & Pr. 677. The Virginia statute authorizing waiver of answer under oath makes express exception of the unverified answer in hearings on bill and answer only. Va. Code, § 3281.

20. Coleman v. Lyne, 4 Rand. 454. The rule is otherwise in the Federal courts. Equity Rule 30.

*motion to dismiss or by answer—and that every defense heretofore presentable by plea in bar or abatement shall be made in the answer.*²¹

It is further provided that the answer may set up "as many defenses, in the alternative, regardless of consistency as the defendant deems essential to his defense."²²

§ 208. The same—continued.—In the Federal practice, the answer is also made to serve largely as a substitute for the cross-bill, by the provision that "the answer must state in short and simple form any counter-claim arising out of the transaction which is the subject-matter of the suit, and may, *without cross-bill*, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him."²³

Provision is made for a reply by the plaintiff where such set-off or counter-claim is asserted in the answer—but in the absence of such cross-claims, the filing of the answer makes up the issue, and *no replication is required*.²⁴ Provision is also made for amending the answer.²⁵

§ 209. The same—continued—oath.—Former Federal Equity Rule 41 provided for the waiver of the oath to answers. This provision is omitted from the new Rules, but it seems clear from these rules as a whole, that the answer no longer requires verification, and is no longer an instrument of evidence in the Federal courts, save possibly when responding to interrogatories.²⁶

§ 210. Amendment of answer.—Where the answer is sworn to, as it must have been under the former practice, there were sound reasons why the courts were reluctant to permit

21. Rule 29.

22. Rule 30.

23. Rule 30.

24. Rule 31.

25. Rules 19, 34.

26. Rules 29-32, 58.

amendments—a privilege to be granted only in rare instances and for good cause shown, as in case of mistake or surprise.

But where, by reason of waiver of the oath in the bill, the answer is not sworn to, and hence is no longer the sworn testimony of the respondent, but a mere pleading, there is no reason why amendments should not be permitted as freely as in the case of any other pleading. Amendment of answers is provided for in the Federal practice.²⁷

CHAPTER XVII.

THE REPLICATION.

§ 211. **The replication in equity.**—This very simple pleading requires but little explanation. As already indicated in our treatment of the amended bill,¹ *special* replications are obsolete in equity pleading, and have been substituted by the amended bill; so that under modern equity practice the complete case of the plaintiff must *be shown in his bill*, original or amended.²

§ 212. **Replication always general.**—In modern times, therefore, the replication in equity is *general* only—that is, it is a mere traverse, in general terms, of the defensive allegations of the plea or answer, and, by implication, a reassertion of the allegations of the bill. It may not, in consequence, confess and avoid, but may merely *deny* the defensive allegations of the adversary pleading. If the plaintiff desire to confess the truth of the defendant's pleading and to avoid such confession by adducing new matter, he must resort to an amended bill.³

27. Equity Rule 30.

1. *Supra*, § 119.

2. The special replication was abandoned because of the delay and expense entailed. Story, Eq. Pl. 878.

3. Thus, under a general replication, plaintiff cannot confess a release set up by the defendant, and avoid the effect by proving that the release was executed during infancy, nor set up fraud in the inducement,—but he is restricted to proof that he *did not execute* such

§ 213. The same—function of the general replication.—

The special function that is subserved by the general replication is to inform the defendant that the plaintiff *does not admit the truth of the plea or answer*, but, on the contrary, that he means to controvert all the defensive assertions therein—thus warning the defendant that he must sustain his defensive allegations by testimony. Hence the rule of the forum is, not without reason, that failure on the part of the plaintiff to file a replication is *an admission of the truth of the adversary pleading*. The result is, that if the latter be a *plea*, the case must be heard on the bill and plea only—that is, in professional phrase, the plea is “*set down for argument*.”

If the adverse pleading be an *answer*, the juridical situation is that the case must be “*heard on bill and answer*”—a very dangerous situation for the plaintiff, as we have already seen.⁴

§ 214. The same.—It appears, therefore, that only by filing the replication is an issue of fact raised—an issue that must be decided on testimony to be introduced by each party. Until the replication to the plea or answer is filed, therefore, there is *no issue of fact*, and hence *no testimony can be taken*. So that, after all, the general replication serves a quite useful function in equity practice.

§ 215. The replication in Virginia.—But as the actual filing of replications in Virginia is extremely rare—counsel usually relying on the clerk of the court to enter on the rule-book a memorandum of such filing, based on fiction only; or else relying on the recitation, usually inserted in the first decree, that the cause was “heard on the bill and answer (or plea) *with general replication thereto*”—many cases formerly reached the court of ap-

release. It seems, however, that if the release, or other defense, set up in the plea or answer, is *absolutely void*, and not voidable only,—as a release by a married woman under the common law disabilities of coverture—or, doubtless, under circumstances constituting fraud in the *factum*—such invalidity may be shown under a general replication. *Stewart v. Conrad*, 100 Va. 128, 7 Va. Law Reg. 767 (n).

4. *Supra*, §§ 204-205. See *Cocke v. Minor*, 25 Gratt. 246.

peals in which (by oversight of the clerk or of the counsel) there was no replication, either in fact or by fictitious recital; but the parties had proceeded to take testimony as if there had in fact been a replication. In such cases the court was accustomed, somewhat unreasonably, to reverse the case for want of a replication. To remedy this a statute ⁵ was enacted, providing, in substance, that the absence of a replication shall be immaterial where the defendant has taken depositions as if there has been a replication; or where, even though defendant has not taken depositions, substantial justice has been done.

§ 216. Replication in the Federal courts.—Under the new Rules,⁶ replications are practically abolished, save where the answer sets up a set-off or counter-claim, or where a reply is specially ordered by the court or judge. The cause is regarded as at issue as soon as the answer is filed, and any new or affirmative matter therein shall be “deemed to be denied by the plaintiff.”

If the cross-claim affect other *defendants*, provision is made for service of a copy of the claim on such defendants or their counsel, who are entitled to ten days within which to reply.⁷

5. Va. Code, § 3540.

6. Rule 31.

7. *Ib.*

CHAPTER XVIII.

THE TESTIMONY.

1. DEPOSITIONS.

§ 217. **The testimony in chancery.**—After the cause is at issue, the next step is the taking of the testimony of witnesses. In the equity practice the testimony is not taken in the presence of the chancellor at the trial of the case, but the depositions of the witnesses are taken in writing before a notary, or other authorized officer, prior to the hearing.¹

Reasonable notice to the adversary is required of the time and place of the taking of the depositions, in order that he may appear and cross-examine the witness, if desired. After a deposition is taken, it is subscribed by the witness, certified by the officer, and is then transmitted by the officer taking the same, to the clerk of the court where the suit is pending.

§ 217a. **Depositions—dispensation of notice.**—Where the defendant has been summoned by publication, and has not appeared, in person or by counsel, no notice of the taking of depositions is required unless ordered by the court.^{1a}

1. Formerly depositions were taken under a *commission expressly* issued for the purpose by the court (no longer required in Virginia except in the course of the probate of a will—Va. Code, § 3361), and were taken secretly by the examiner, on written interrogatories filed by the respective counsel. Neither counsel nor parties were permitted to be present, and hence until the taking of all the testimony was closed and the result made public—which was done only by order of the court, technically known as “passing publication”—counsel had knowledge neither of the nature of the interrogatories filed by his adversary, nor of the answers of the witnesses thereto. It was only by special leave of court, and for cause shown, that further testimony could be taken after publication passed. The purpose of this secrecy was to avoid the temptation to procure perjured testimony in defense or rebuttal.

1a. Va. Code, § 3232.

§ 218. The same—rules of evidence.—The rules of evidence are practically the same in equity as at law—and so as to the competency of witnesses.²

§ 219. Exceptions to evidence.—In equity, as at law, objections to evidence, or to the competency of a witness offered by the opposite party will be considered as waived unless the objection be reasonably made. These objections in equity are made in the form of exceptions taken in writing, and entered in the body of the deposition. Such exceptions should distinctly point out the ground upon which they are based. Since the officer before whom taken has no power to pass upon the exceptions, the practice is, after exception entered, to permit the contested evidence to go in, subject to be excluded on argument of the exceptions before the court.

We cannot here go into the details of the practice in taking testimony,—and must content ourselves with a general reference to treatises on evidence, and to certain statutory provisions in Virginia.³

§ 220. Time within which depositions may be taken—earliest period.—The question as to how early in the cause of the suit the parties may begin the taking of testimony seems not to have been definitely fixed. Custom, however, seems to permit the plaintiff to begin the taking of testimony as soon as the cause is *matured and set for hearing*, though the defendant has not appeared. In the Federal courts ⁴ the rule contemplates that depositions (when permissible at all) may be taken after the cause is “*at issue*”—which, where the defendant has not appeared and pleaded, probably means after the cause is matured and set for hearing.

2. The right of discovery from either party was formerly a conspicuous exception, already noticed.

3. Before whom taken: Va. Code, § 3359-3360; how attendance compelled: id., § 3354; no special commission necessary, as was formerly required: id., § 3361; notice: §§ 3362-3363; certification and filing: id., § 3366; general provisions: id., chap. 164. For *form of deposition*, see *post*, *Appendix*.

4. See *infra*, § 222, footnote 7.

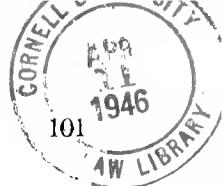
§ 221. **The same—latest period.**—Where not regulated by statute or rule of court, as it is not in Virginia,⁵ there is no fixed period within which the parties, plaintiff and defendant, must complete the taking of their testimony. So far as there appears to be any rule on the subject in the Virginia practice, the parties have a *reasonable time* within which to take testimony. In practice, this reasonable time is construed by professional comity to mean all the time either party desires—with the result that there is much inexcusable delay in the trial of chancery causes. The court has the power to rule either party to greater diligence, and to fix a limit of time beyond which no further testimony may be taken; but counsel in Virginia who would resort to such harsh and unaccustomed measures in a chancery suit, except under very unusual circumstances, would be regarded by his professional brethren as a disturber of ancient traditions and as encroaching upon one of the most cherished privileges of the profession.

§ 222. **Testimony continued—ore tenus in Federal courts.**—The method of taking testimony in the equity practice of the Federal courts has been revolutionized by the new Equity Rules, in the provision that “in all trials in equity the testimony of witnesses shall be taken in *open court*.”⁶ But provision is made for taking depositions, by special order of the court, wherever permitted by statute, or “for good and exceptional cause, * * * to be shown by affidavit.”⁷ The depositions when permissible must be taken promptly, as indicated in the footnote.

5. See *Goode v. Bryant* (Va.), 87 S. E. 588. The only statutory provision on the subject in Virginia, is the provision that a deposition may be read, if returned before the hearing of the cause, or, though after an interlocutory decree, if it be as to a matter not thereby adjudged, and be returned before a final decree. Va. Code, § 3362.

6. Rule 46. The same rule makes provision for what is practically a *bill of exceptions* where evidence is offered and excluded over the objection of either party.

7. Rule 47. Depositions for the plaintiff must be taken, unless otherwise ordered by the court for good cause, *within sixty days* from



2. ISSUE OUT OF CHANCERY, OR FEIGNED ISSUE.

§ 223. **Issue out of chancery—when proper.**—Although regularly the testimony in chancery is not taken *ore tenus*, but is presented in the form of depositions of witnesses, yet where the testimony is so conflicting, or the circumstances of the case are otherwise such, that the chancellor is in doubt as to the truth of a particular issue of fact, he may refer the question to a jury for a verdict thereon, in aid of his conscience.

Originally such issues were framed by the chancellor and sent out to a common law court for trial—the latter court certifying the verdict back to the chancery court. But in Virginia, where the same court exercises both law and equity jurisdiction, these issues are tried *before the chancellor himself*—and whether on the chancery or law side of the court is immaterial.⁸ The Virginia statute⁹ authorizes the court, in its discretion, to order such an issue even before any evidence is taken, where it is “shown by affidavit or affidavits, after reasonable notice, that the case will be rendered doubtful by the conflicting evidence of the opposing party.”

the time the cause is at issue; and those for the defendant within *thirty days* thereafter—with *twenty days* for rebuttal testimony.

As to evidence before examiners or like officers, see Rules 49-54. Provision is made by Act of Congress for depositions in certain cases—as where the witness lives more than a hundred miles from the place of trial, or is sick, or infirm, or is about to go without the jurisdiction, etc. U. S. Rev. Stat., §§ 863-867. Rule 54 preserves this right. As to the construction of these statutory provisions, see *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604; *McLennan v. Railway Co.*, 22 Fed. 198; *Giles v. Paxson*, 36 Fed. 882; *Thum v. Andrews*, 53 Fed. 84; *Am. Exchange Bank v. First Nat. Bank*, 82 Fed. 961, 27 C. C. A. 274; *Gormley v. Bunyan*, 138 U. S. 623.

8. *Lavell v. Gold*, 25 Gratt. 473; *Meade v. Meade*, 111 Va. 451. See *Powell v. Manson*, 22 Gratt. 177, where Staples, J., explains the practice and procedure. See further: Michie's annotation to *Lavell v. Gold*, *ubi, supra*; *Stevens v. Duckett*, 107 Va. 17; *Carter v. Jefferies*, 110 Va. 735. For *forms* of such issues, see the case last cited, and *Jones v. Buckingham Slate Co.*, 116 Va. 120, 124. See Federal Equity Rule 23.

9. Va. Code, § 3381, and Pollard's annotations.

§ 224. **The same—waiver by the parties.**—In a recent Virginia case,¹⁰ the evidence on certain disputed questions of fact was so conflicting as to present a proper case for an issue to be tried by a jury, but as neither party requested such a trial the chancellor himself tried and decided the issue. On appeal, the appellate court found the testimony of so conflicting a nature that grave doubt was entertained whether the finding of the lower court was or was not in accordance with justice. Thereupon the appellate court reversed the decree and directed the chancellor, in spite of the implied waiver of the parties, to submit the issue to a jury.

The decision is criticized by a writer,¹¹ on the ground that since the parties had waived a jury trial, the decree could not be reversed for the failure of the lower court to direct such a trial.

But when it is recalled that in this state the erroneous exercise of judicial discretion is ground for reversal; that the question of directing the trial of an issue by jury is to be determined by the court, according to the circumstances of the case, *regardless of the wishes of the parties*; and that on appeal in a chancery case it is the duty of the appellate court to consider the testimony and pass upon the issues of fact involved, in spite of the findings of the chancellor below, and hence that it is as fully its right and duty *ex mero motu* to direct such an issue, in aid of its judicial conscience, as it is the right and duty of the chancellor in aid of his conscience, the criticism loses force. In short, if the parties cannot by their waiver or by their expressed protest deprive the *chancellor* of the power to call in the assistance of the jury, neither should waiver or protest deprive the *appellate court* of that power.

§ 225. **Effect of the verdict.**—The effect of the verdict on an issue out of chancery is quite different, in theory at least, from that of a verdict in a plenary action at law—since the former is regarded as *merely advisory*, and in aid of the chancellor's con-

10. *Shoemaker v. Shoemaker*, 112 Va. 798.

11. 17 Va. Law Reg. 717.

science; and if the chancellor disagree with the jury, he may not only reject the verdict, but may himself decide the issue of fact contrary to the view taken by the jury. While this is the theoretical situation, in practice the verdict will generally be accepted; and if rejected, unless there were material errors committed on the trial, or the circumstances unusual, the appellate court would be apt to accept the decision of the jury rather than that of the chancellor.¹²

CHAPTER XIX.

CONSOLIDATION OF CAUSES.

§ 226. **Consolidation.**—Where several suits are pending in the same court by the same plaintiff, or, in proper case, by independent plaintiffs, against substantially the same defendants, and involving substantially the same subject-matter, it is often convenient and economical to have an order consolidating the several causes and thereafter proceeding with them as a single suit.

§ 227. **“Consolidation”—“Hearing together”—distinction.**—The terms *consolidation* and *hearing together* are not infrequently confused, and the terms used as if they connoted the same thing. They are, however, distinct. Whenever causes are consolidated they are necessarily heard together, but “hearing together” does not necessarily imply a “consolidation.” It frequently happens, as appears from the reported cases, that an order of consolidation is treated throughout by counsel and court as a mere order to hear together—in other words, that the former term has not been used in its technical sense. It is in the latter sense that we shall use it in this brief study.

§ 228. **Consolidation—general effect.**¹—Where several causes are technically consolidated they become in effect a *single suit*, at least in so far as the circumstances of the several

12. See authorities, *supra*.

1. As to the effect on appellate jurisdiction, see *infra*, this chapter.

causes permit complete oneness. The evidence in one becomes the evidence in the other (subject of course to the control of the court to prevent injustice); the parties to one become parties to the other;² and the cause proceeds for all purposes as if the several causes had been originally asserted in a single original bill. It must be observed, however, that it is the *proceedings* that are consolidated and not the *claims asserted*, save where the latter belong to the same plaintiff.

§ 229. Hearing together—effect.—On the other hand, where there is a mere order of *hearing together*, unmodified, the suits remain as several as before, the only effect being that for convenience and economy the several steps toward a final disposition are taken at the same time, and usually in the same decree. The parties to one are not parties to the other, and the evidence in one is not necessarily evidence in the other.

These results may be, of course, and often are, enlarged more or less by express stipulation, or by conduct or acquiescence of the parties, or by the action of the court. Where such departure from the type occurs, the situation will present some, or all, of the features of a technical consolidation.³

§ 230. Consolidation—confusion in the authorities.—There has been a most unfortunate situation produced, especially in Virginia, by the apparently conflicting views expressed from time to time in our Courts of Appeals in connection with this subject—a confusion due largely to *dicta* originating in *Claiborne v. Gross*,⁴ in which one of the judges suggested that consolidation of causes, without consent of parties, was *beyond the powers of a court of equity*, and consequently unknown in the equity practice—a doubt that has been more than once repeated in later cases. In a somewhat careful search not a single Virginia case has been discovered in which there is a square decision on the propriety of consolidating causes in equity. In all of the

2. *Patterson v. Eakin*, 87 Va. 49—noticed at length, *infra*, § 234n. See *infra*, § 230.

3. See *Home Building Co. v. London*, 98 Va. 52.

4. 7 Leigh 331.

Virginia cases in which the question has appeared, however, it has been assumed that the effect of consolidation was to convert the several suits *into one suit for all purposes*—and in each of them the absence of this assumption would have eliminated the necessity for considering the question of the propriety of the consolidation.

The still unsettled condition of the Virginia authorities on the primary question of the propriety of consolidating equity causes seems to justify the somewhat extended notice of the Virginia authorities in the sections that follow.

Outside of Virginia there are comparatively few authorities denying or doubting the power of courts of equity to order the consolidation of causes, though in many jurisdictions the term seems to be used as connoting a mere *hearing together*. This seems especially true of the Tennessee cases, in which state questions under this head seem to have arisen more frequently than elsewhere.⁵

§ 231. Consolidation—without consent of parties.—

Since *ex vi termini* technical consolidation connotes the complete conversion of several suits into one suit, it follows that where the several claims could not *originally* have been asserted in a single suit, they may not, when separately asserted, be *subsequently* united by consolidation. If their joinder in a single original bill would have rendered the bill multifarious, their subsequent joinder by consolidation would present the same vice.

The evil of multifariousness rests not alone in the inconvenience to the court of hearing dissimilar claims, asserted by different parties, but in the wrong done to the litigants in compelling them to become parties to a litigation in one or more branches of which they have no interest.⁶

5. These, with authorities from other jurisdictions, are collected in 8 Cyc. 589, 592, 608. See also, Fletcher, Eq. Pl. & Pr. 455; Rev. Stat. U. S., § 921; Toledo, etc., R. Co. v. Continental Trust Co., 95 Fed. 497; Beach v. Woodyard, 5 W. Va. 321; Wyatt v. Thompson, 10 W. Va. 645; Burnham v. Dalling, 16 N. J. Eq. 310; O'Bannon v. Roberts, 2 Dana (Ky.) 54; Bowles v. Schoenberger, 2 B. Mon. (Ky.) 372.

6. See *Multifariousness*, ante, Ch. VIII.

§ 232. **The same—by consent.**—But as the objection of multifariousness is not jurisdictional, and hence, under sanction of the court, may be waived by the parties, there would seem, on principle, to be no difficulty presented where the consolidation is by consent or acquiescence of all parties—a proposition apparently conceded by all the authorities.

The same—several suits between the same parties.—So where the several suits are between the *same parties*, concerning the *same subject-matter*—as where the plaintiff has instituted several creditors' suits against the same defendant.⁷ Here all the claims might have been, and therefore more regularly should have been, asserted in a single suit; and consolidation is but a more convenient and more economical method of converting what are in fact but several branches of a single suit into one suit.

§ 233. **The same—different plaintiffs who might have united in a single suit.**—Here again, on like considerations, there is no sound reason why the several suits may not be consolidated, and it is in this class of cases that consolidation is most common in practice—as in the case of several creditors' bills, or bills by legatees, shareholders, tax-payers and others representing members of a class similarly situated.⁸ In such cases

7. In such case there may be consolidation even *at law*. *McRae v. Board*, 3 Rand. 481.

8. See *Creditors' Bills*, *post*, Ch. XXXI. In *Claiborne v. Gross*, 7 Leigh 331, two separate creditors' bills by different plaintiffs against the same defendant were consolidated by order of the trial court—one case involving an amount that made it appealable, while in the other the amount was below the required minimum. The consolidated suit was dismissed, and plaintiffs appealed. Opinions were delivered by two of the three judges participating in the decision—both discussing, with some elaboration, the power of the court to direct a consolidation without consent. Carr, J. (Brockenbrough, J., concurring) denied the power in any case without consent, with Tucker, P., arguing *contra*. Both admitted, however, that the question was immaterial, since in spite of the order of consolidation the lower court in its decree had *treated the causes as separate*, and there had been separate petitions for appeal. All agreed in dismissing the

not only may the court direct a consolidation, but, as shown in connection with creditors' bills,⁹ the assumption of jurisdiction in one of the suits, as by an order of reference, demands either a consolidation or its equivalent, namely, a suspension of all the other suits and a convention of all the claimants in the suit ripened by the order of reference. The consolidation, therefore, is but another method of securing the necessary convention of all parties in the single ripened suit.¹⁰

§ 234. The same—claims which could not have been united in a single suit.—On the contrary, where the claims asserted in the several suits are so diverse, either as to subject-matter or parties, that to have asserted them in a single original bill would have called for a dismissal of the bill on demurrer for

appeal in the cause in which the amount involved was not within the required minimum. Hence the entire discussion of the propriety of the consolidation was extra-judicial. This becomes the more apparent in the light of subsequent decisions establishing the principle that even where the several plaintiffs assert their claims in the *same bill*, each claim must involve the *jurisdictional amount* in order to sustain an appeal by the plaintiff on that claim. *White v. Building Fund Association*, 96 Va. 270.

In *Barger v. Buckland*, 28 Gratt. 850, three creditors' bills, by different plaintiffs against the same defendant were consolidated, apparently without express consent of all parties. No process had been served on the defendant in one of the cases, but he appeared and made defense to the entire cause as consolidated, without objection. Here again the court expresses a doubt (citing the *dictum* in *Claiborne v. Gross*, *supra*), as to the power of the court to consolidate without consent of parties, but holding that by appearing and defending without objection, the defendant had waived the objection. The discussion of the question of the power to consolidate was therefore an obvious *dictum*. See an equally obvious *dictum* in *Patterson v. Eakin*, 87 Va. 49, overruling, so far as one *dictum* may overrule another, the *obiter* expressions noticed above. This case is again noticed in the footnote to the section following.

9. *Post*, Ch. XXXI.

10. In *Barger v. Buckland*, *supra*, the consolidation of several creditors' bills, by different plaintiffs, was held proper when acquiesced in by the parties, though the court was not quite clear (citing the *dictum* in *Claiborne v. Gross*, *supra*) whether consolidation or whether an order for "*hearing together*" were the proper procedure.

multifariousness, it seems clear that it would be error to direct a consolidation, without consent of parties. If, as already shown, the effect of consolidation is to convert the several independent suits into a single suit, as fully and effectually as if all the claims had been asserted in a single original bill, then manifestly the question of the propriety of such joinder is the same in the one case as in the other. If it be error and an injustice to force an objecting party into a litigation multifarious *in its inception*, it is equally erroneous and unjust to compel him to litigate his rights in a proceeding which *has become multifarious by subsequent consolidation*. If the proceeding be in fact multifarious, the question of how the multifariousness was produced, or when, is immaterial. The injustice to the protesting party is as great in the one case as in the other.¹¹

11. *Wyatt v. Thompson*, 10 W. Va. 645. Such a case was indirectly presented in *Smith v. Pyrites Mining Co.*, 101 Va. 301, where what was termed a supplemental bill was dismissed by the lower court, and an appeal taken more than twelve months afterwards. On motion to dismiss the appeal as barred by limitation, the question involved was whether the decree of dismissal was a final decree. Neither the parties to the supplemental bill nor its purposes were the same as in the original bill. The court held the appeal barred, and took occasion to say that because the parties and objects were not the same, even treating the new bill as an original bill, the two causes could not have been consolidated, but might have been *heard together*. But the point was not involved in the decision.

At first glance, the case of *Patterson v. Eakin*, 87 Va. 49, seems at last to afford authority on the lines of our present inquiry, but, as in apparently all the other Virginia cases in which the subject of consolidation is discussed, the question was not involved, and the discussion *obiter*. In that case there were two suits by different plaintiffs, but both involving the administration of the estate of the same testator—one by a creditor seeking enforcement of a vendor's lien on a single parcel, and the other by devisees for a sale of other real estate of the testator for payment of a single remaining debt, and a reinvestment of the residue. After various proceedings in each, including a sale to satisfy the vendor's lien, the two suits were consolidated. Subsequently a sale of the property last mentioned, made under order of the court, to one Patterson, was confirmed in vacation without notice to one Figgatt, who had in the meanwhile become assignee of both debts, as well as assignee from the purchaser

§ 235. Consolidation continued—effect on the appellate jurisdiction.—Where all the claims asserted in the several suits belong to the *same plaintiff*, or to the *same plaintiffs jointly*, though severally less than the jurisdictional amount required for an appeal, yet in the aggregate are within the required amount, it would seem clear that on consolidation of the suits, the aggregate amount involved would be the test of the plaintiff's right to appeal.¹² This is clearly so in determining the right of the

of the parcel affected by the vendor's lien. The two judicial sales had produced an aggregate amount *far in excess of all the debts*, so that in fact Figgatt had not the slightest concern with the vacation order of confirmation. But his petition to vacate the order of confirmation, because of lack of notice to him, was sustained by the lower court, and Patterson, the purchaser, appealed. Instead of contenting itself with a declaration in the first instance, that as Figgatt's debts were abundantly provided for, and therefore no injury could result to him by the omission of notice of the application for confirmation, the appellate court entered into an extended discussion of the powers of courts of equity to consolidate causes; it discarded doubts that had been expressed in the previous cases noted above; it declared that Figgatt, as assignee of the purchaser in the first suit, thereby became a party to that suit; that on consolidation he thereupon became a party to the second suit as well; and hence that he was entitled to notice of the application for a confirmation of the sale involved in the second suit. Thus the court seems to decide squarely that consolidation was a proper method of procedure in the case at bar (as it probably was, since the two suits involved substantially the same subject-matter, and the objects sought in both might well have been accomplished in a single suit), and that the effect was a complete conversion of the two causes into one. But after this exhaustive study of the propriety and effect of consolidation, and a thorough vindication of the petitioner's right of notice, the conclusion is announced that, after all, as Figgatt could not possibly have suffered detriment from lack of notice, the lower court committed error in granting his petition, based on absence of notice,—and hence the action of the lower court was *for that reason reversed*. In other words, the question of consolidation and its effect was immaterial. So that the case is not authority for any proposition connected with the subject of consolidation.

12. In *Devries v. Johnston*, 27 Gratt. 80, the precise question of the effect of a consolidation of such causes was directly presented. Here, three separate suits by the *same plaintiffs* (partners) against the *same defendants* (also partners), each suit involving less than the

defendant to appeal, even though the several claims are asserted by different plaintiffs.¹³

But where the claims are distinctly *several*, and are asserted by *different plaintiffs*, though against the same defendant, the consolidation can have no greater effect than if the several causes had been asserted in the same bill.¹⁴ And the same rule must be applicable to both. That is, their combination, whether in a single original suit or by consolidation, does not alter the several nature of the claims, and therefore adds nothing to their privileges of appeal. As already pointed out, in such a case it is not the *claims* that are consolidated, but the *proceedings* merely; and though there be a decree *joint* in form, it is in nature *several*, and must, for purpose of appeal by the plaintiffs, be so regarded.¹⁵

amount required for appellate jurisdiction, but all aggregating more than the required jurisdictional amount, were consolidated; and the question was whether the consolidation had the effect of giving the appellate court jurisdiction of the *plaintiffs'* appeal. Anderson, J., who delivered the opinion, held that such was the effect—but unfortunately there were other questions involved, and two of the four judges sitting dissented, without assigning reasons, with the result that the decree below was *affirmed*. The case, therefore, settled nothing. But on principle Judge Anderson's ruling seems sound—since all the claims were due to the appellants as partners, and might have been united in one suit. And since, instead of dismissing the appeal, the decree of the lower court was affirmed, the presumption is that the dissenting judges concurred on the question of jurisdiction.

13. *Infra*, n. 15.

14. As in the case of bills by members of a class similarly situated, discussed *supra*, § 233.

15. *Claiborne v. Gross*, 7 Leigh 331—(a case of consolidation, noticed at length, *supra*, § 233, n. 8); *Umbarger v. Watts*, 25 Gratt. 167 (several creditors in the same bill); *White v. Building Fund Association*, 96 Va. 270 (another case of several creditors in the same bill). Where the *converse* situation is presented, and the *defendant*, against whom all the claims are asserted, becomes appellant, the *aggregate* of all the claims asserted, whether in a single or a consolidated suit, fixes the amount involved for the purpose of appellate jurisdiction. *Craig v. Williams*, 90 Va. 500 (a case of consolidation); *Hicks v. Roanoke, etc., Co.*, 94 Va. 741.

§ 236. **Resume.**—From the foregoing, we conclude that equity causes may be consolidated only under the following circumstances:

1. By consent of parties; or
2. Where the several claims asserted, whether by the same or by different plaintiffs, might originally have been asserted in a single suit.

CHAPTER XX.

MISCELLANEOUS PROCEEDINGS.

1. PROCEEDINGS IN VACATION.

§ 236a. **Vacation proceedings.**—By reason of the peculiar remedies in equity—and especially preventive and administrative remedies—courts of chancery, as the result of statute, rules of court or inherent power, exercise a more extensive jurisdiction in vacation than courts of law.

§ 236b. **The same—in the Federal courts.**—The district courts of the United States, as courts of equity, are deemed always open for the purpose of filing pleadings, issuing and returning mesne and final process, and for interlocutory proceedings preparatory to the hearing of causes on their merits. And the judges are given power, as well in vacation as in term, on reasonable notice, to make and direct all such interlocutory orders, etc., preparatory to the hearing of causes on their merits.¹

§ 236c. **The same—in Virginia.**—By statute in Virginia, the chancellor may exercise, among others, the following powers in vacation:

- (a) To grant injunctions,² and appoint receivers.^{2a}

1. Equity Rules 1-6.

2. Va. Code, § 3437.

2a. *Post*, § 380.

- (b) To dissolve injunctions.³
- (c) To enter interlocutory orders preparatory to the hearing of causes on their merits; confirming a report of sale; ordering a re-sale; appointing commissioner to convey title to land sold in the cause, etc.⁴
- (d) *By consent of parties*, entered of record, any equity cause may be submitted for hearing and decree in vacation.⁵
- (e) To punish, by contempt proceedings, disobedience of any decree or order.⁶

2. STIPULATIONS AND CONSENT PROCEEDINGS.⁷

§ 237. Nature and purpose.—For dispatch of business and to save expense and inconvenience to parties and counsel, certain of the formalities of procedure are frequently waived by stipulation between the respective counsel. Such stipulations, when proper, are favorably regarded by the courts.

Thus it is not unusual for counsel to agree to a continuance of the cause—to consent to a hearing of the cause, or some part thereof, before the court or a master, on a designated day, or in vacation—to waive formal notice of the taking of depositions—to the admission of the genuineness of certain documents, or the truth of certain allegations of fact without proof—to the filing, withdrawal, or amendment of pleadings—to give further time to the adversary for the taking of certain steps in the cause—to the waiver of informalities or irregularities—and generally to waive rules of practice or procedure not affecting the substantial merits of the cause.

While counsel have implied authority to waive matters of practice and *procedure*, they may not without express sanction waive the substantial *rights* of the client.

§ 238. The same—form—stipulations in pais—in court.
—To prevent unseemly controversies between counsel as to the

3. Id., § 3444.

4. Id., § 3426.

5. Id., § 3427.

6. Id., § 3428.

7. Fletcher. Equity Pl. & Pr. 447-454; Thompson on Trials, 193-202.

precise scope and meaning of stipulations into which they have entered, all important agreements of this character should be reduced to writing, or if made in court should be entered of record.

In many jurisdictions, in order that such stipulations may be recognized and enforced by the court in spite of their repudiation by one of the parties thereto, statutes or rules of court require that they shall be in writing, or else entered of record.⁸

3. PROVISION FOR SPEEDY TRIALS IN FEDERAL COURTS.

§ 238a. Continuances in the Federal courts.—To prevent the delays traditionally incident to equity proceedings, the new Equity Rules have prescribed stringent regulations to speed the trial of equity causes. One striking provision seeks to eradicate the former evil of indefinite continuances by consent of parties, or generally at the request of either party.

The rule⁹ provides that a cause when placed on the trial calendar shall not be continued beyond the term, save in exceptional cases, and except on order of the court and for good cause shown by affidavit, on such terms as the court may impose.

Such continuance beyond the term by *consent of parties*, may be allowed "on condition only that a stipulation be signed by counsel for all the parties and that all costs incurred theretofore be paid. Thereupon an order shall be entered dropping the cause from the trial calendar, subject to reinstatement within one year upon application to the court by either party, in which event it shall be heard at the earliest convenient day. If not so reinstated within the year, the suit shall be dismissed without prejudice to a new one."

8. *Smith v. Smith*, 119 N. C. 311, 25 S. E. 877; *Morse v. State*, 39 Tex. Cr. R. 566, 50 S. W. 342; *Caldwell v. McWilliams*, 65 Ga. 99; *Citizens Bank of Wichita v. Farwell*, 56 Fed. 570.

9. Equity Rule 57.

CHAPTER XXI.

ORDERS AND DECREES.

§ 239. **Explanatory.**—The term “order” is used to denote some action of the court not touching the merits of the case—for example, appointing a guardian *ad litem*; giving leave to file a pleading; referring certain inquiries to a master; continuing the cause, etc.

The term “decree” is applied to more formal and decisive action by the court, touching the merits of the cause.

§ 240. **Preparation of decrees.**—Orders and decrees, while couched in the language of the court, and expressing its mandate, are always drawn by counsel—usually by him in whose favor, or on whose application, the order or decree is granted.

Skill in draughting decrees is an essential professional acquirement, and the student cannot too early, or too eagerly, begin to cultivate skill in this line of professional duty.

In practice, counsel takes (mental or written) notes of the chancellor’s decision—unless the chancellor himself hands down written notes for the purpose, as is sometimes done in a complicated case. Then, at his leisure, and usually in his own office, counsel draws the form of the decree, conforming as nearly as possible to the chancellor’s directions. This is called a “note for decree.”

It is then submitted to adversary counsel for approval. In case of dispute whether the decree correctly expresses the court’s views, counsel apply to the chancellor to settle it.

When in final shape, the note for decree is signed by the chancellor—in Virginia, endorsed “enter” and authenticated by the chancellor’s initials—and is then copied by the clerk in the “Chancery Order Book.”

§ 241. **Recording of decrees.**—All orders and decrees granted each day, are entered in this book, under a general heading showing that date; and at the end of the entries for that day,

the chancellor appends his signature. The order or decree as it appears in this book, and not the note for decree, is regarded as the original record of the court's action. That is to say, the decree is inchoate as a record, until so entered and signed, or, in the language of the American books, "enrolled."¹

§ 242. "Enrollment" of decrees—English practice.—The term "enrollment" in connection with decrees is one of common use in reference to proceedings in the English chancery courts. It probably has not the same judicial significance in the American practice. Under the former English practice interlocutory decrees in chancery appear to have been not always, or generally, in writing, and hence were not in the record otherwise than in the form of memoranda or notes taken by the registrar. But the "definitive sentence" (i. e. the *final* decree) was written out and signed by the chancellor, and *enrolled* (i. e. permanently recorded). And when thus enrolled, it appears to have been treated as a *final decree*, and therefore to be reheard only on a bill of review, *without regard to whether the term of the court were ended or not*. Hence *enrollment connoted finality of the decree*. A *definitive sentence enrolled* was therefore the test of finality for purposes of a bill of review.²

§ 243. The same—American practice.—On the other hand, according to the American practice, all orders and decrees in chancery, interlocutory as well as final, are reduced to writing and copied (or enrolled) in the order book, and signed by the chancellor. Hence, in the American courts, *enrollment does not connote finality*. But, as we have already seen in connection with *Bills of Review*,³ to be final the decree must not only be a definitive sentence (and in Virginia something more than merely definitive, or settling the principles of the cause), but it must be

1. And when a vacation decree, otherwise valid, is entered in the order book by the clerk on Sunday, it is inoperative as a decree of the court, and hence cannot be the foundation of an appeal. *Lee v. Willis*, 99 Va. 16, 6 Va. Law Reg. 691n.

2. See *infra*, next section, footnote 4.

3. *Ante*, §§ 150-151.

entered on the order book and signed by the judge ("enrolled") and *the term of the court must have ended*. Hence, in the American equity practice, in addition to (1) the definitiveness of the sentence, and (2) enrollment, the decree is not final until (3) adjournment of the term.⁴

4. This attempted explanation seems justified, though somewhat obscurely, by Mr. Goulds' notes to Story, Eq. Pl. 403n (a) and 421n (a) (10th ed.). The explanation is here essayed because of difficulties the author has had in getting at the sense in which the term "enrollment" is used in American books on equity practice, in connection with the review or rehearing of decrees. The statement constantly recurs that "a petition to rehear cannot be filed after enrollment of the decree," or that "a bill of review will lie only to an enrolled decree"—statements which are intelligible enough when referred to the English practice, but hopelessly confusing when applied to our American practice. See, for example, Story, Eq. Pl. 421 and *passim*; Fletcher's Eq. Pl. & Pr. 724, 746; Van Zile's Eq. Pl. & Pr. 332-335. Mr. Shipman ventures the explanation that a rehearing may be granted only where "the decree has *not been enrolled—as it is termed—that is, before the close of the term in which it is rendered.*" Shipman, Eq. Pl. 152. But, as we have already seen, enrollment and adjournment of the term do not, according to our practice, render final a decree that is interlocutory in its nature.

In the earlier editions of Daniell's Chancery Practice (*e. g.* 2nd English ed. by Headlam, 1st Am. ed. by Perkins, 1846) 1220-1232, will be found a full account of the highly technical proceedings which accompanied the enrollment of decree, as well as of the legal effect of enrollment. The earlier editions of this classical work more accurately portray the English equity practice as inherited by the American courts, than do the later editions, because of the marked changes produced in the English practice by the General Orders of Lords Cottenham and Langdale in 1841, and incorporated into Mr. Daniell's later editions. The student will find some estimate of the comparative values to the American lawyer, of these several editions, set out in the opinion of Mr. Justice Bradley, in *Thomson v. Wooster*, 114 U. S. 104. "From what has been said," this master of the English equity practice says, "it may be collected that all decrees which are *final in their nature, i. e.* which amount to a determination of the question in the cause, *may be enrolled* * * *. But mere interlocutory decrees, made upon motion or petition, which do not decide any of the merits of the cause, and only relate to the proceedings in it, *cannot be the subject of enrollment.*" *Id.*, pp. 1224-1225. As further indicating the American view that decrees, whether enrolled

§ 244. **What is a final decree.**—This question has already been discussed in connection with *Bills of Review* ⁵ a discussion which need not here be repeated.

§ 245. **Form of decrees.**—The form of the decree will depend largely on its purport. There is no rule of practice fixing a prescribed form; but, as in the case of most legal documents, custom has fixed the form of at least certain parts of the decree, from which it is not well for the young practitioner to depart.

Under the usual equity practice, each decree should recite, at the beginning, the pleadings on which the cause is heard.⁶

§ 246. **The same—in the Federal courts.**—In the Federal courts, the practice is prohibited, and it is declared that none of the pleadings, nor any master's report "or other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: 'This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.': (here insert the decree or order)."⁷

§ 247. **Enforcement of decrees.**—The several methods by which courts of equity enforce the performance of an obedience to their decrees are explained in a later chapter.⁸

or not, and howsoever final in their nature, continue in the breast of the court until *adjournment of the term*, see the former Equity Rule 88, and the new Rule 72—the latter declaring that errors of a certain character "may at any time *before the close of the term at which final decree* is rendered, be corrected by order of the court or a judge thereof, upon petition," etc.

5. *Ante*, §§ 150-151.

6. This practice, borrowed from the early English practice, still continues in Virginia, though obsolete, by statute or custom, in most of the states. The practice at least possesses the advantage of permanently recording, on the face of the decree, a list of the pleadings and other documents on which the case was submitted, and upon which the decree was based, instead of reliance upon the clerk's notation of them upon his docket or rule-book.

7. Equity Rule 71. For forms of decrees, and particularly of the "bringing on" clause, under the Virginia practice, see *post*, *Appendix*.

8. Chapter xxiv.

§ 248. **Dismissal from docket.**—In entering a decree completely disposing of the whole subject-matter of the litigation, it is usual to insert at the end of the decree an order dismissing the cause—the usual form being: “*The object of this suit having been accomplished, it is ordered to be stricken from the docket.*”

After such dismissal, the court has no power to re-instate the cause, except on a bill of review, which, in Virginia, must be filed within one year.⁹

If there be need for further orders in the cause after such dismissal, and there be no grounds for a bill of review, or the bill of review is time-barred, such relief can only be granted by the institution of a new suit.¹⁰ To avoid this inconvenience, it is common practice, where the circumstances warrant the precaution, to reserve, on the face of the final decree, the right to reinstate the cause, on motion, for the purpose of securing complete benefit of the decree.

By Acts of 1899-1900, page 582, the court is authorized to re-instate the cause after final decree, in order that a new commissioner may be appointed where a commissioner dies before conveying property as directed by the decree.

§ 249. **Voluntary dismissal**—“**without prejudice.**”—As hereafter observed in connection with creditors’ bills, the plaintiff is *dominus litis*, and may dismiss the suit at any stage before affirmative rights of others have attached. This rule is not confined to creditors’ bills, but applies to equity suits of every character.

An order of reference in a creditors’ suit, or the filing of a cross-bill by the defendant asserting a counter-claim, is held to deprive the plaintiff of the right to dismiss his bill.¹¹

Where the plaintiff thus voluntarily dismisses his suit, or wherever the suit is dismissed involuntarily for reasons *not affecting the merits of the case*, the order should recite that the dismissal is *without prejudice* to plaintiff’s right to institute such

9. See *Bill of Review*, ante, Ch. xiii.

10. *Battaile v. Maryland Hospital*, 76 Va. 63; *Echols v. Brennan*, 99 Va. 150.

11. See *Creditors’ Bills*, post, Ch. xxxi.

further suits concerning the same matter as he may be advised—since, in the absence of such a saving clause—particularly where the order does not indicate that the dismissal was voluntary—the plaintiff in a future litigation over the same matter may be confronted by a plea of *res judicata*.

§ 250. The same—“dismissed agreed.”—This precaution is especially important where the order shows that the dismissal was by *agreement of parties*. Such a dismissal,—usually indicated in the brief phrase “by consent of parties this suit is dismissed agreed”—when not without prejudice, implies an adjustment of the litigation, and *prima facie* may be pleaded in bar of a new suit on the same cause of action. “It is a declaration of record,” says Anderson, J., “sanctioned by the judgment of the court, that the cause of action has been adjusted by the parties themselves, in their own way, and that the suit is dismissed agreed.”¹²

§ 251a. Correction of errors in decrees.—We have already learned how errors in decrees may be corrected in the *trial court*, namely, (1) In the case of interlocutory decrees by *Petition to Rehear*,¹³ (and in certain cases by motion¹⁴), and (2) in the case of final decrees by *Bill of Review*.¹⁵ Where these remedies have been resorted to in vain, or where such resort is not required, the only remaining remedy is by *appeal to a higher court*. The subject of appeals is reserved for a later chapter.

12. *Hoover v. Mitchell*, 25 Gratt. 387. See also *Siron v. Ruleman*, 32 Gratt. 215, 223 (*per* Burks, J.); *Wohlford v. Compton*, 79 Va. 333. Cf. *U. S. v. Parker*, 120 U. S. 89.

13. *Ante*, Chapter xiii, § 155.

14. *Id.*, § 156, note.

15. *Id.* Ch. xiii.

CHAPTER XXII.

THE MASTER'S REPORT.¹

§ 252. Notice to parties.—The parties interested in the execution of an order of reference, are entitled to notice of the time and place fixed upon for the hearing, and a reasonable opportunity to present evidence of their claims or in their defense.

In Virginia this notice may be given by publication in a newspaper when so directed by the court.² The evidence introduced before the master is by depositions, which he usually returns with his report, though not required to do so unless specially requested by some party in interest.³

§ 253. Exceptions to report.—By statute, as in Virginia,⁴ or by rule of court as in the Federal courts,⁵ the report of the master after it is completed, is filed in the clerk's office, where it lies for a prescribed period for such exceptions to confirmation as any party may desire to file. The period in Virginia is *ten* days, and in the Federal courts *twenty* days. Failure to file exceptions will ordinarily operate as a waiver of objections—and in the Federal courts the rule declares that if no exceptions are filed within the period allowed the report shall stand confirmed.⁶

§ 254. Character of exceptions.—Exceptions to a master's report have been likened to special demurrers, in that they must specifically point out the errors complained of, otherwise they

1. For sundry provisions with reference to the appointment, powers and duties of masters, and the proceedings before them, see Va. Code ch. 163; Equity Rules 59-68.

2. Va. Code § 3321. See Equity Rules 59-68 (order of reference in the Federal Courts declared permissible only in exceptional cases).

3. *Maddox v. Skinker*, 93 Va. 479, 483.

4. Va. Code § 3325.

5. Equity Rule 66.

6. *Id.*

will not be considered.⁷ After filing his exceptions counsel should see that they are brought to the attention of the court, and, if overruled, that the decree so recites, since on appeal if the court's ruling on the exceptions does not appear, the appellate court will presume a waiver.⁸

§ 255. Weight to which report entitled.—While the finding of the master, on a question of fact, is *prima facie* correct—because he has seen the witnesses and been able to observe their demeanor and their disposition to speak the truth candidly, or otherwise—nevertheless such report is not entitled to the weight of the verdict of a jury. That is to say, if upon reading and testimony, the court is satisfied that the finding should have been otherwise, it will overrule the finding of the master.⁹

7. *Bank v. Trigg*, 103 Va. 327, 340; *Wilkes v. Rogers*, 6 Johns. 566; *Story v. Livingston*, 13 Pet. 359. See form in *Appendix*.

8. *Mountain Lake Co. v. Blair*, 109 Va. 147.

9. *Shipman v. Fletcher*, 91 Va. 473; *John Diebold Co. v. Tatterson*, 115 Va. 766; *Barton, Rise and Fall of the Commissioner in Chancery*, 1 Va. Law Reg. 485; *Kimberly v. Arms*, 129 U. S. 512. As the master is a *quasi* judicial officer, it goes without saying that he cannot delegate his functions or any part of them to another person. *Mountain Lake Co. v. Blair*, 109 Va. 147.

CHAPTER XXIII.

JUDICIAL SALES.¹

§ 256. By whom made.—Sales under decrees of a chancery court are usually made by masters, or commissioners—either regular or specially appointed by the court for the purpose.

In Virginia it is customary to name one or more of the counsel in the cause, as special commissioners of sale. They are required to give bond, in such penalty as the court may prescribe, with good security, in each case; and, to avoid abuses which have occurred in the past, the commissioner is forbidden to advertise the sale until he has executed the required bond. It is further provided that the clerk's certificate that the bond has been executed shall be appended to the advertisement.²

§ 257. Terms of sale.—The terms of sale are largely in the discretion of the court, to be fixed as seems best in the interest of all parties—or, as declared by the statute,³ “for cash, or on such credit and terms as it” (*i. e.*, the court) “may deem best.”

The usual terms of sale of real property in Virginia, are from ten to twenty-five *per centum* of the purchase price *cash* (dependent on the particular circumstances); and the residue on a credit, in equal installments, of *six, twelve and eighteen months* (or *one, two and three* years, according to circumstances); in all cases with interest from the day of sale; the purchaser executing notes or bonds for the deferred installments, payable to the commissioner of sale, or to the order of the court. The deferred installments are generally secured by retention of title until the pur-

1. See *Decrees of Sale*, Va. Code, Ch. 167; Michie's annotations, 21 Gratt. 636.

2. *Id.*, §§ 3397-3399, 3401. If no special commissioner is appointed, the sale is made by the *sheriff or sergeant*: § 3403. The commissioner or officer may receive not more than five *per centum* of the first \$300, and two *per centum* of the residue of the proceeds, as his commissions: § 3404.

3. Va. Code § 3397.

chase money is fully paid, and not infrequently the court will require sureties on the notes or bonds, and always the waiver of the homestead exemption.

§ 258. The sale—how made.—While the court has authority, in its discretion, to accept private bids, judicial sales are usually made at public auction, and on the premises, unless the court orders otherwise, and the property is knocked down to the highest bidder.

The decree of sale should prescribe with preciseness the terms and place of sale, and should give directions as to advertising the sale.

§ 259. Relations between the court and the successful bidder.—Acceptance of the bidder by the commissioner creates a somewhat anomalous relation between the court and the bidder. As the bid is not made in the presence of the court, and as the commissioner is without authority to do more than to accept the bid subject to the court's approval, if the ordinary rules of contract were applied the bidder would not be bound by his bid, for lack of mutuality—and might, therefore, without assigning reasons, and without liability, withdraw his offer at any time before acceptance by the court. But to require mutuality of obligation in such case, and to permit the successful bidder to withdraw after the sale is over and the other bidders dispersed, would render the expense of the sale a total loss, and otherwise lead to intolerable inconvenience. If the confirmation of a judicial sale be subject to the whims, not only of the first successful bidder, but of an indefinite number of subsequent successful bidders, it is a supposable result, in a particular case, that the sale could never be consummated.

Hence equity has established its own rule on the subject, namely that the bidder is bound *from the moment of the conditional acceptance of his bid*, while the court, as vendor, may (not arbitrarily, but in the exercise of a proper discretion) either *accept or reject the bid*.⁴

4. While this somewhat dogmatic statement is generally accepted by the profession, difficulty has been encountered in finding author-

Another departure, in this connection, from accepted doctrines of the law courts, is the rule of the equity court that its sales are *not within the statute of frauds*—and hence that the bidder is bound by his parol offer, without a writing.^{4a} The reason is, of course, that it cannot be presumed that the court would perpetrate or permit the perpetration of a fraud on the purchaser.

§ 260. How sale confirmed—report of commissioner.—

After sale made, the commissioner makes a report thereof, in

ity directly in point. Mr. Daniell asserts that the English rule is *contra*, and that the bidder is not bound, until acceptance by confirmation of the report. 2 Daniell, Ch. Pr (6th Am. Ed.) 1275, 1281. No American case has been found where the question of the right of the bidder, before confirmation, to withdraw his bid was squarely presented and squarely decided. The case of Camden v. Mayhew, 129 U. S. 73, is the nearest known approach to such a decision. In this case, the property was knocked out to Camden as the highest bidder, on terms requiring full payment in cash. He refused to comply with the terms of his bid, and the commissioner so reported to the court. On the hearing of the report, the bidder, being present in court, was offered the option of complying with the terms or of having the property resold at his risk. He refused to exercise the option, whereupon the court, *without confirming the sale*, entered an order of resale at the bidder's risk; and the property having brought at the re-sale a considerably less sum, a decree was entered against him for the difference between the amount of his bid and that produced by the re-sale. The court, in an elaborate opinion by Mr. Justice Harlan, affirmed the decree. It does not distinctly appear, however, from the opinion that Camden, in terms, repudiated his bid before confirmation—though his refusal in open court, to abide by it, would seem to have been in fact a repudiation. If so, the decision appears directly in point—since the only ground on which the bidder could have been held liable for the deficiency, was that he was bound by his bid, though not accepted.

In Talley v. Stark, 6 Gratt. 340, and Thomas v. Davidson, 76 Va. 338, it seems to have been assumed by all parties, as well as by the court, that the bidder was thus bound before confirmation. Stout v. Philippi, etc., Co., 41 W. Va. 339, 23 S. E. 571 seems also authority for the proposition. Authorities discussing the relations generally between the purchaser and the court, are collected in Freeman's annotation to Mount v. Brown (Miss.), 69 Am. Dec. 365, 368-375. See *infra*, § 267.

4a. Robertson v. Smith, 92 Va. 450.

writing, to the court, returning with his report a certificate of deposit for the cash payment, and the notes or bonds of the successful bidder, with an itemized statement of the expenses incurred.⁵ The report usually contains a recommendation from the commissioner that the sale be or be not confirmed, with reasons.

After lying ten days in the clerk's office for exceptions (or earlier by consent of parties) the report may be brought to the attention of the court for confirmation or rejection. On confirmation, the transaction for the first time assumes the nature of a completed contract, binding the court as well as the purchaser.⁶ On rejection, a re-sale is ordered, and an order is entered directing that the cash payment and the notes or bonds be returned to the bidder.

§ 261. Appreciation or depreciation in value before confirmation.—The rule of the English equity courts was that if the property materially appreciated in value before the confirmation—as by the falling in of lives, discovery of mines, etc.—the court would refuse confirmation and order a re-sale; and, *per contra*, in case of material depreciation, as by injury from fire or flood, the bidder would not be held to his bid.⁷

The American rule seems to be the same, in spite of the apparent difference between the English and American view as to the binding nature of the unconfirmed bid.⁸

5. In some jurisdictions, the expenses are paid out of the cash collections, without a special order, and vouchers are returned with the report, but this is not the better practice.

6. For an exposition of the principles which should guide the court in confirming or refusing to confirm the commissioner's report of sale, see *Brock v. Rice*, 27 Gratt. 812 (*per Staples, J.*); *Berlin v. Melhorn*, 75 Va. 639 (*per Burks, J.*); *Watkins v. Jones*, 107 Va. 6; *Howell v. Morien*, 109 Va. 200. See *Opening the Bidding*, *infra*, § 263.

7. 2 Daniell, Ch. Pr. (6th Am. Ed.) 1275—results necessarily flowing from the English rule, as already noted, that until confirmation the bidder was not bound by his offer.

8. The rule as to re-sales by bidders at an enhanced price, and the principle of opening the biddings, noticed in the sections following, seem to sustain the proposition stated as to the effect of *appreciation*

§ 262. Re-sale by purchaser before confirmation.—If before confirmation of the sale it comes to the attention of the court that the purchaser has re-sold the property at an enhanced price, the court will usually refuse to confirm the sale, and will order the property to be again put up for sale—since such re-sale is an indication that the property did not bring its full value at the court's first sale. Such re-sale by the purchaser is known as "trading behind the back of the court."⁹

§ 263. Opening the bidding—upset bids.—Where land has been cried out at a judicial sale, the legal situation, as already pointed out, is peculiar—the purchaser being bound by his bid, but the court, under whose decree the sale is had, is not bound to accept the bid, but, on the contrary, may refuse to confirm the sale, and may order a re-sale, if, in its opinion, the property did not bring its fair value.

The policy of the court, however, is to encourage prospective bidders to attend its sales and thus insure a good price for the property that it administers. This policy is best subserved when bidders are encouraged to feel that if the property is knocked out to them the court will confirm the sale. The practice of allowing other parties to come in after the sale is over, with offers of a larger sum for the same property (known as "opening the biddings"), is not only unfair to the successful bidder, but tends to discourage bidding at such sales. Hence courts are averse to receiving upset bids, where the new bidder attended, or had an opportunity to attend, the public sale.¹⁰

of the property before confirmation. And while the books abound in assumptions that the converse rule obtains in case of material *depreciation*, little or no direct authority can be cited. See *Heywood v. Covington*, 4 Leigh 373; *Taylor v. Cooper*, 10 Leigh 317, 319; *Cocke v. Gilpin*, 1 Rob. 39; *Brock v. Rice*, 27 Gratt. 812, 815; *Berlin v. Melhorn*, 75 Va. 623, 641; *Va. F. & M. Insurance Co. v. Crabtree*, 85 Va. 857, 861 all indicating that the rule operates equally in favor of the bidder or against him.

9. *Camp v. Bruce*, 96 Va. 521; 4 Va. Law Reg. 743, and note by Prof. Burks.

10. This subject is well discussed in a note by Prof. Burks in 4 Va. Law Reg. 690, 693. See 8 Am. & Eng. Enc. Pl. & Pr. 65; Watkins

§ 264. Title of purchaser—caveat emptor.—In judicial sales it is a settled rule that the court *does not guarantee the title* to property which it sells, but the purchaser buys at his own risk.

Courts of equity, however, are usually careful to see that all interests and all adverse claims are represented in the suit, so that the sale may be made free of liens, and that the purchaser may receive a good title to the property sold.¹¹ The purchaser is usually allowed time before the sale is confirmed to examine the title, and will not be required to take the property if the title turns out not to be a marketable one. He should object to the title, however, by excepting to the report of the commissioner of sale, *before the same is confirmed to him*.¹²

§ 265. Statutory protection of purchasers on reversal of decree.—In Virginia we have a valuable statutory provision for protection of purchasers at judicial sales. This statute declares that if the sale be made *six months after the decree*, and be confirmed by the court, no subsequent reversal of the decree shall affect the title of the purchaser, but the litigation thereafter shall be over the purchase money.¹³

In Virginia, therefore, it is always safer to *postpone the sale for six months after the decree is entered*.

§ 266. Collection of purchase money—by whom.—Unless the court otherwise directs, the commissioner of sale, after ex-

v. Jones, 107 Va. 6; *Graham v. Burgess*, 117 U. S. 191; *Pewabic Mining Co. v. Mason*, 147 U. S. 367. Where, however, the biddings are opened to let in a new bidder, the practice is not to accept the new bid as final, but to *order a re-sale* at what is known as an "*upset price*"—that is, on the second offering no bid less than the new bid will be received and if no larger price be offered at the re-sale, the property is cried out to the person whose enhanced bid induced the opening of the biddings. The latter is generally required to give security to insure that he will stand to his upset bid.

11. See *Account of Liens*, *post*, §§ 366-370.

12. *Kirk v. Oakley*, 110 Va. 67; *Va. Iron Co. v. Bond*, 111 Va. 319; 2 *Daniell*, Ch. Pr. 1276.

13. Va. Code, § 3425—further noticed in connection with *Sales of Infants' Lands*, *post*, Ch. XXX.

ecution of the required bond, is authorized to collect the purchase money as it falls due from time to time.¹⁴ This he should promptly deposit in some bank approved by the court, and take therefor a certificate of deposit payable to the order of the court in the designated cause, and should file this certificate with his report.

§ 267. The same—purchaser in default.—In case the purchaser make default, either *in limine*, in not complying with the terms of sale by making the cash payment and executing the required obligations with respect to the deferred payments,¹⁵ or in failing to meet the deferred payments when due, the court may, after service of a rule to show cause, order a re-sale at his risk—this summary proceeding being justified by the fact that by purchasing at the judicial sale, the bidder becomes a *quasi* party to the suit, and submits himself to the jurisdiction of the court for all purposes connected with the sale and purchase.¹⁶

§ 268. The same—grace to purchaser.—As an order of re-sale for default of the purchaser is in substance but a process for the enforcement of a vendor's lien, it is error if the decree fails to provide for a reasonable time, by way of grace, within which the purchaser may make good his default before sale made—in analogy to the grace usual in decrees for foreclosure of mortgages.¹⁷

14. Va. Code, § 3401.

15. Camden v. Mayhew, 129 U. S. 73; Stout v. Philippi, etc., Co., 41 W. Va. 337, 25 S. E. 571.

16. *Supra*, § 259; Clarkson v. Read, 15 Gratt. 288; Long v. Weller, 29 Gratt. 347; Thornton v. Fairfax, 29 Gratt. 669, 677; Hurt v. Jones, 75 Va. 341; Williams v. Blakey, 76 Va. 254. The Virginia statute makes special provision for summary proceedings in the cause for a personal decree against the purchaser and his sureties—or against the commissioner and his sureties where the latter fails to account for his collections. Va. Code, § 3402a.

17. Long v. Weller, 29 Gratt. 347.

CHAPTER XXIV.

ENFORCEMENT OF DECREES.

§ 269. Enforcement of decrees—several methods.—

There are several methods by which the decrees of a chancery court may be enforced—amongst the more important of which are (1) *Writ of Assistance*; (2) *Writ of Attachment*; (3) *Writ of Sequestration*; (4) *Writ of Execution*; (5) *Order of Sale*; (6) *Performance by Proxy*; (7) *A new Original Bill in Equity*.

§ 270. (1) **Writ of Assistance.**—Where the decree directs the transfer of specific property, real or personal, temporarily or permanently, a writ of assistance may be authorized by the court, directing the sheriff, or other ministerial officer of the court, to place the designated party in possession.

In the execution of the writ, the officer has all the power, and may exercise all the force, that he possesses and might exercise under an ordinary execution.¹

§ 271. (2) **Writ of Attachment—process for contempt.**—This writ, like that mentioned in the preceding section, is grantable only by the court. But, unlike the writ of assistance, it is directed against the *person* of the recalcitrant, and not against his property. It is in substance an order to the sheriff to attach the *person* of the alleged offending party, and to produce his body before the court at a time named in the writ, to show cause why he shall not be punished for contempt in refusing or neglecting to obey the decree of the court.²

1. Fletcher, Eq. Pl. & Pr. 736; Shipman, Eq. Pl. 161; Equity Rules 7-9, 11 (rule 9 permitting the clerk to issue). The writ is often resorted to in order to place the *purchaser at a judicial sale* in possession of the property purchased—and to enforce orders directing a *receiver* of the court to take possession of property in litigation.

2. Shipman, Eq. Pl. 159; Fletcher, Eq. Pl. & Pr. 733; Foster, Fed. Pr. 339-349a; Equity Rules 7-8; Va. Code, §§ 3428, 3768-3771; Va. Const. §§ 63, 156. For a general discussion of contempt proceedings,

The rigor of this proceeding is often mitigated by the issue of a mere rule (without attachment, or arrest,) against the party alleged to be in contempt, to appear and show cause why an attachment shall not issue.

§ 272. (3) Writ of Sequestration.—This is a proceeding by means of which the *property* of a recalcitrant party is seized (“sequestered”), under orders of the court, by the officer of the court, or by persons specially designated for the purpose (“sequestrators”), with the purpose of retaining the *corpus*, and the rents, issues and profits, under the control of the court, until the obstinate owner obeys the order of the court.

Its use is comparatively rare in modern times, since courts of equity have assumed (generally by virtue of statutes) to issue executions similar to those of the common law courts. The writ is still useful, however, where the decree directs the performance of some act other than the payment of money, or the delivery of property within the jurisdiction³—as where the defendant places himself or the subject-matter beyond the process of the court, but has property within the jurisdiction, or is a corporation and not subject to imprisonment under contempt proceedings.⁴

§ 273. (4) Writ of Execution.—The writ of execution in equity is substantially the same as executions issued from courts of law, and by the Virginia Code is placed on the same footing as executions from the law courts.⁵

see 9 Cyc. 1; 7 Am. & Eng. Enc. L. 25; 5 Va. Law Reg. 49, 281, 345, 392, 832; Carter's Case, 96 Va. 791; Yoder's Case, 107 Va. 823; Gompers v. Buck Stove, etc., Co., 221 U. S. 418, 34 L. R. A. (N. S.) 874. note.

3. The payment of money, or delivery of property located within the jurisdiction may generally be enforced by execution or writ of assistance, as already explained.

4. Fletcher, Eq. Pl. & Pr. 735. Specific provision is made for the writ in the Federal courts by Equity Rules 7-8. See Foster, Fed. Pr. 339-349a.

5. § 3557; id. chs. 175-176; Fletcher, Eq. Pl. & Pr. 734.

§ 274. (5) **Order of Sale.**—The jurisdiction to subject property by a sale thereof, in the foreclosure of mortgages and the enforcement of other liens or specific charges thereon, has been long established, and is one of the most common and useful forms in which the equity jurisdiction is exercised.⁶

§ 275. (6) **Performance by proxy—execution of documents.**—It is probable that under the original equity practice, a decree for the execution of a deed or other document could only be enforced by the process of contempt, or if this failed to move an obstinate defendant, the only recourse was the sequestration of his property.⁷

As the decree could only operate *in personam*—on the person or conscience of the defendant—it was incapable, *ex proprio vigore*, of operating to transfer legal title.⁸

§ 276. **The same—execution by master.**—This difficulty has been removed in probably all of the states by a statutory provision authorizing the court to appoint a special master to execute necessary documents on behalf of any party to the cause, and imparting to such documents the same potency as if executed personally by him or them on whose behalf made.⁹ Other statutes declare that the decree itself shall, *ex proprio vigore*, operate according to its terms, directly on the *res* with the same effect as if proper documents had been executed.¹⁰

§ 277. **The same—conveyance by foreign master.**—As the decree of the courts of one state cannot affect property in another state, it follows that where the court of the former directs a conveyance by its master, of property in the other state, such conveyance is wholly inoperative in the latter state.¹¹ Un-

6. See *post*, *Creditors' Bills*, Ch. xxxi; *ante*, *Judicial Sales*, Ch. xxiii.

7. Fletcher, *Eq. Pl. & Pr.* 737; 1 Barbour, Ch. Pr. 441.

8. Lile, *Notes on Equity Jurisp.* 17-18; Proctor *v.* Ferebee (N. C.), 36 Am. Dec. 34 (n); *cf.* Jones *v.* Woodstock Iron Co., 95 Ala. 551.

9. Va. Code § 3418; Equity Rule 8; Hurt *v.* Jones, 75 Va. 341.

10. Ala. Code (1907), § 3211; Va. Code, § 2535 (decrees in partition); *Id.* §§ 3422-3423 (substitution of trustees).

11. Fall *v.* Eastin, 215 U. S. 1; extensive annotation (showing some dissent) 69 L. R. A. 673, 694; Lile, *Notes on Eq. Jurisp.* 18.

less, therefore, the court has jurisdiction of the *person* of the defendant, and the latter is *sui juris*, so that he may be compelled by process of contempt, or otherwise, to convey extritorial property, the court is powerless to deal with such extritorial property.¹²

§ 278. (7) Original bill to enforce decree.—Where, by occurrence of subsequent events, as by neglect of the parties, or otherwise, the enforcement of a decree has become impracticable through ordinary process of the court, or the rights of the parties have become so embarrassed or uncertain as to require the further aid of the court—and the original suit has been completely ended, and has been dismissed from the docket without leave reserved to reinstate—a bill in the nature of an original bill may be filed for such relief as the situation may demand.

§ 279. The same—right of defendant to contest former decree.—Of course on such a bill there can be no review or re-trial of the original cause, all the issues in which have become *res judicata*—but the relief will be confined to fixing and enforcing the rights of the parties under the former decree.¹³

It seems, however, that the *defendant* in the new bill may set up fraud, mistake or other lack of equity in the decree sought to be enforced, and thus invoke the protection of the maxim that “he who wants equity must do equity;” and the plaintiff may then be put on terms of doing equity as the price of the court’s assistance.¹⁴

12. See *Hotchkiss v. Middlekauf*, 96 Va. 649.

13. *Story*, Eq. Pl. 429; *Fletcher*, Eq. Pl. & Pr. 958; *Mitford*, Eq. Pl. 95; *Root v. Woolworth*, 150 U. S. 401.

14. *Story*, Eq. Pl. 641; 2 *Daniell*, Ch. Pr. (6th ed.) 1586; *Wadhams v. Gay*, 73 Ill. 415; *Gay v. Parpart*, 106 U. S. 679; *Lawrance Mfg. Co. v. Janesville Cotton Mills*, 138 U. S. 552; *Hamilton v. Houghton*, 2 Bligh (H. of L.) 169. “I do not understand the rule to be that this court is bound to carry into execution an erroneous decree. On the contrary, I apprehend that when a person comes into this court asking for the benefit of a former decree, he must be prepared to show, if the case requires it, that such decree was right.” *Ld. Chancellor of Ireland*, in *O’Connell v. McNamara*, 3 Dr. & War. 411.

CHAPTER XXV.

SPECIAL ANCILLARY PROCEEDINGS FOR SECURING FRUITION OF DECREES.

§ 280. **The special proceedings.**—The special proceedings to be here mentioned, are (1) *Attachments of Property* (under local statutes); and (2) *Appointment of Receivers*.

1. ATTACHMENT UNDER LOCAL STATUTES.

§ 281. **Attachment in equity under Virginia Statute.**—This statute¹ is peculiar in that it confers plenary jurisdiction on the courts of equity in this state over a large class of *purely legal claims*, provided proper grounds be alleged in the bill for an attachment of the defendant's property under the general attachment laws of the state.

"When any person," declares the statute, "has a claim, *legal or equitable*, to any *specific personal property*, or a like claim to any debt, *whether such debt be payable or not*,² or to *damages for the breach of any contract*, express or implied, if such claim exceed twenty dollars, exclusive of interest, he may, on a bill in equity filed for the purpose, have an attachment to secure and enforce the claim, on affidavit made by himself, his agent or attorney, according to the nature of the case, conforming as nearly as its nature will admit to the affidavit required by section 2959."³

§ 282. **The same—continued.**—The proceedings in such a suit as is here authorized are so much simpler than those of at-

1. Va. Code § 2964.

2. That is, where the debt is not yet due—in which case the statute excludes the equitable proceeding if the only ground of attachment be that the defendant is a *non-resident* or a *foreign corporation*.

3. That is, the affidavit required in an attachment at law, where the defendant is about to remove himself or a material part of his estate from the commonwealth, or in otherwise endeavoring to hinder, delay or defraud his creditors.

tachment proceedings at law, that the custom of practitioners of experience is to resort to the equitable procedure, where possible, in all attachment cases.

In such cases, the court is expressly empowered to secure the protection and forthcoming of the property at the proper time by injunction and the appointment of a receiver.

§ 283. The same—continued—frame of the bill—practice.—In this equitable proceeding the bill is framed as in other suits in chancery, except that it alleges the statutory grounds, or some of them, for the attachment; and all persons in whose hands property of or debts due to the main defendant are to be attached or garnished, *must be made co-defendants*.

The bill must then be verified by the required affidavit—or in lieu of affidavit to the bill, there may be a separate affidavit of the existence of the statutory grounds of attachment. The former is neater, and a preferable method.

On the filing of the verified bill, or of the separate affidavit as mentioned, the clerk issues an ordinary *subpœna* in chancery against the main defendant and each of the defendant *garnishees*; and on the *subpœna* the clerk endorses *an order to the officer to whom it is directed*, to attach “the specific property (if any be mentioned in the affidavit) and the debts owing by other defendants (if any) to the defendant against whom the claim is, and also any other estate of that defendant, whether in his own hands or in the hands of other defendants.”

The *subpœna*, with such endorsement, is then served by the officer—the officer proceeding with the order of attachment as if it were from a law court,⁴ and he makes return of the *subpœna* (with the order of attachment) and his return of how he has executed both *subpœna* and order of attachment, as directed on the face of the *subpœna*.⁵

4. That is, as directed by § 2967.

5. That is, either to a rule-day or to the first day of a term. §§ 3220, 2965. It was held in *Craig v. Williams*, 90 Va. 500, that although the *subpœna* in such case was properly returnable to a rule-day, yet that the *order endorsed thereon* (which could not be separated from it, and was not, and in itself is not expressed to be, re-

After service and return of the *subpœna*, the statute declares that the proceedings shall be the same as in other suits in equity.⁶

2. APPOINTMENT OF RECEIVERS.

§ 284. **Receivers.**—A receiver is a disinterested person specially appointed by a court of equity, in an *in rem* proceeding, to take charge of the *res*, where it seems improper that any of the litigants should retain the possession during the pendency of the suit. The chief purpose of his appointment is to preserve and safeguard the *res, pendente lite*, so that it may be forthcoming to answer such decree as may be awarded on the hearing of the cause.

A study of the topic of receivers and the practice connected therewith is reserved for later chapters.⁷

turnable anywhere) must, under the then provisions of § 2965 (which at that time required that every "attachment" should be returnable to a term of the court) have been returned to a term of the court. The effect of this ruling is now overturned by an amendment of § 2965, by Acts 1902-3-4, p. 593.

6. It is clear that where the claim is *legal*, it is the attachment alone that gives jurisdiction; and hence if the attachment fails, the bill must be dismissed. But if there be equitable jurisdiction on other grounds, and the attachment is *ancillary* only, the failure of the attachment does not oust the equitable jurisdiction. See *Devries v. Johnston*, 27 Gratt. 809.

7. See *Receivers, post*, Chs. xxxii-xxxiii.

CHAPTER XXVI.

SPECIAL INSTANCES OF SUITS FOR RELIEF.

§ 285. **Preliminary.**—No attempt will be here made to catalogue, even if this were possible, the various equitable grounds on which suits in equity may be filed.

The student is presumed, from his studies of equity jurisprudence, to be familiar with the diversified field of rights and remedies over which courts of equity exercise either exclusive or concurrent jurisdiction. Nor need it be suggested that wherever there is an equitable right to be protected, or an equitable remedy to be sought, the plaintiff may have access to the ear of the court by a bill praying the desired relief—and (in an original proceeding) by bill only.

§ 286. **The more common classes of suits.**—Among the more common classes of suits in equity may be mentioned: Suits to foreclose or redeem a mortgage; to enforce a vendor's or a mechanic's or a judgment lien on real property; for specific performance of a contract; to establish and enforce a trust; for the construction of wills and trust instruments, and for advice to fiduciaries; for the settlement of fiduciary accounts; for the settlement of decedents' estates; to set aside conveyances fraudulent as between the parties, or as to creditors; for exoneration, contribution or marshalling; for divorce and alimony; for sale of lands of persons under disabilities; for the assignment of dower; to set up lost instruments; to correct mistakes; for injunctions; for partition; for relief from penalties and forfeitures; creditors' bills; bills for discovery, etc.

§ 287. **Some of these more in detail.**—A few of the suits named have been selected for a more or less detailed study of the proceedings, with special emphasis on related questions of practice likely to make difficulty for the young practitioner—namely:

- I. *Bills for Injunction.*
- II. *Bills for Partition.*
- III. *Bills for Divorce.*
- IV. *Bills for Sale of Lands of Infants and Lunatics.*
- V. *Creditors' Bills.*

CHAPTER XXVII.

I. INJUNCTION SUITS.

§ 288. **Grounds of injunction.**—The circumstances under which relief by injunction will be granted, belong rather to the topic of equity jurisprudence than to that of equity procedure. The Virginia Code¹ enumerates a large number of instances in which injunctions may issue—most of these declaratory of the common law.

§ 289. **Preliminary injunctions**—“**restraining orders.**” —Some of the courts make a distinction between a preliminary (or temporary) *injunction* and a *restraining order*—the latter contemplating a less extended stay than the former, and resorted to only in cases of great emergency. The restraining order is usually, in terms, limited to a very brief period fixed in the order, and the plaintiff is required in the meantime, to give notice to the defendant of his intention, within the period named in the order, to apply for a temporary injunction.²

§ 290. **Preliminary injunctions**—**notice.**—By the unwritten law, the question whether the defendant is entitled to notice of the application for a preliminary injunction rests in the sound discretion of the court or judge to whom the application is made. Whether such notice should or should not be required depends on the special circumstances of each case. Justice requires that such notice should be given, if practicable, unless the emergency does not permit, or unless there be reason to apprehend that the defendant, by being put on notice of the application, will be able to defeat, and will probably defeat, the very purpose for which

1. *Passim*—see title *Injunctions* in index, and Chapter 168.

2. Provision is made for such restraining orders (*sub nom. injunction*) by Va. Code § 3435a, with sundry provisions for enlarging or vacating them. Equity Rule 73 makes like provision for such orders in the Federal courts. See *infra*, § 291.

the injunction is sought. The Federal Equity Rule stated in the section following seems a concise and accurate statement of the unwritten rule.

The question of notice in such cases is regulated in many states by statute. In Virginia the statute is but declaratory of the unwritten law.³

§ 291. The same—in the Federal courts—notice.—The Federal courts are prohibited from granting a preliminary injunction without notice to the opposite party.⁴ But a temporary *restraining order* may be granted without notice where it “clearly appears from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice.” In such case “the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order.” The opposite party, on two days’ notice to the adversary, may appear and move the dissolution or modification of the order.⁵

§ 292. Bill for preliminary injunction—affidavit to bill.—The Virginia statute, which seems in this respect but declaratory of the unwritten law, forbids the awarding of an injunction in any case not ready for hearing, “unless the court or judge be satisfied, by *affidavit or otherwise*, of the plaintiff’s equity.” That is to say, the allegations of the bill must be sustained *prima facie*, either by affidavit or other sufficient evidence.⁶

§ 293. The same—jurisdiction to award.—In Virginia, preliminary injunctions, even in vacation, may be awarded by the judge of any circuit or corporation court in the state—regardless of the locality of the controversy or the residence of the parties.⁷

But, as we have already seen, the suit is to be instituted and finally to be heard in the county or corporation where the act or

3. Notice may be required “if in the opinion of the court or judge it be proper that such notice should be given.” Va. Code § 3440.

4. Equity Rule 73.

5. Id.

6. Va. Code § 3440. See Equity Rule 73.

7. Va. Code § 3437. See *Receivers, post*, § 380.

proceeding to be enjoined is to be done, is doing or apprehended—or, if it be to a *judgment or judicial proceeding*, then in the court that rendered the judgment or in which the *proceeding is*.⁸

§ 294. **The same—indemnifying bond.**—The practice of all chancery courts, as a condition precedent to the granting of a temporary injunction, is to require that the plaintiff, or some one for him, shall execute a bond, with good security, conditioned to indemnify the defendant against all loss or damage which may be incurred by the defendant in case the injunction shall be dissolved.⁹

§ 295. **Preliminary injunction—how served.**—Where the injunction is granted before service of the *subpœna*, as may be done in a proper case, a copy of the order is generally endorsed on or attached to the *subpœna*, and served by the sheriff along with the *subpœna*, the clerk certifying thereon that the required bond has been executed.

§ 296. **Motions to dissolve preliminary injunctions—in vacation—affidavits.**—As the plaintiff may, in a proper case, obtain a preliminary injunction in term or in vacation, the *defendant* has the like privilege, after reasonable notice to the adverse party, of moving to *dissolve*, in term or in vacation, and before the cause is matured for hearing.¹⁰

And, again, as the plaintiff may secure the injunction on *affidavits*, so the defendant on his motion to dissolve, may be heard on *counter-affidavits*. In such case, the defendant may use his sworn answer as an affidavit—but *only as an affidavit*, since the cause not having been matured, the answer, on the motion to dissolve, whether oath be waived in the bill or not, is not read as a *pleading*, nor as having the evidentiary value of a sworn answer under the original equity practice.

8. Va. Code § 3436. For venue of such suits, see *ante*, § 23.

9. This practice is confirmed by the Virginia statute (Va. Code § 3442), except as to personal representatives or other persons from whom, in the opinion of the court, it may be improper to require bond.

10. Va. Code § 3444.

§ 297. **Effect of dissolution.**—Where an injunction is dissolved after the maturing of the cause and a hearing *on the merits*, the order is final as to the vacation of the injunction—unless modified or revoked at some subsequent stage of the proceeding, or reversed on appeal.¹¹ But where the injunction is dissolved on a *preliminary hearing*, the court may, at the hearing on the maturing of the cause, grant or re-instate the injunction and make it perpetual. Hence, where the injunction is thus dissolved before the cause is matured, (or heard in vacation on the merits, in the absence of consent of parties, entered of record as required by the statute)¹² the order is not final, and the court or judge may not at that stage of the proceeding dismiss the bill.¹³

§ 298. **Original jurisdiction in judges of Court of Appeals to award injunctions.**—The Virginia statute¹⁴ provides that where a circuit or corporation court, or a judge thereof shall refuse to award an injunction, application may be made on the original papers, with a copy of the proceedings in court and with the judge's order of refusal, to a judge of the court of appeals who may thereupon award the injunction. Such order, when awarded by the appellate judge, is directed to the clerk of the lower court of the proper *venue*, and thereafter "the proceedings thereupon shall be as if the order had been made by such (lower) court or the judge thereof."¹⁵

11. Where the bill is a *pure* bill of injunction, the dissolution of the injunction on final hearing, calls as of course for a *dismissal of the bill*. Va. Code § 3446. *Contra*, of course, where the injunction is merely *ancillary*—in which case the dissolution of the injunction does not impair the court's jurisdiction to grant other equitable relief sought by the bill. *Pulliam v. Winston*, 5 Leigh 324.

12. Va. Code § 3427.

13. *Mount v. Radford Trust Co.*, 93 Va. 427.

14. Va. Code § 3438.

15. *Id.*, § 3439. The effect of this statute was the subject of a somewhat acrimonious discussion by the majority and minority of the judges in *Wilder v. Kelley*, 88 Va. 274. The dissenting opinion of Lewis, P. (concurring in by Fauntleroy, J.), seems the only possible interpretation, *viz.* that when the appellate judge grants the injunction he acts *not in an appellate capacity*, but as the judge of another court of co-ordinate jurisdiction. This seems plain from the language of the statute as quoted above.

Bill to enjoin legal proceedings.

§ 299. Bill to enjoin proceedings at law—requiring confession of judgment.—Where defendant at law files a bill in equity to enjoin proceedings at law, the court may put him on terms of confessing a judgment at law, as the price of its assistance. This is largely a matter of judicial discretion.

§ 300. The same—(a) When such confession may be required.—If it appear from plaintiff's bill that the defendant (plaintiff at law) has a good *equitable defense only*, then, on his motion for a preliminary injunction against the proceeding at law, fairness to the defendant (plaintiff at law) seems to require that plaintiff in equity should confess judgment at law—subject, of course, to the control of the court in the injunction proceedings.

If the plaintiff in equity succeeds in making out his equitable defense at the hearing, the court will enter a perpetual injunction against the judgment, and no harm will have resulted from the confession. If, on the other hand, the plaintiff in equity fails to make out his equitable defense, thus calling for a dissolution of the injunction and a dismissal of the bill, the confession of judgment, previously required, saves the plaintiff at law from harm by reason of the injunction—since it not only renders unnecessary further proceedings at law, but it leaves the plaintiff at law where he would have been had the injunction not interfered.

Here the court has merely applied the maxim that “he who wants equity must do equity.” It has required the plaintiff in equity, as the price of its assistance, to put his adversary in a position where as little harm as possible will result from the preliminary injunction, in case it be finally dissolved.

§ 301. The same—(b) When confession not required.—But where the defense at law is *not equitable only*—where the plaintiff in equity *denies his adversary's right to recover in any forum, legal or equitable*, and the application for relief in equity is only because, under all the circumstances, equity is a more appropriate tribunal in which to conduct the litigation—then, no such terms as a confession of judgment will be ex-

acted of the defendant at law, as the price of the court's assistance; since this might imperil his legal defense, in case he should fail to make out his equitable defense at the hearing; in other words, it "would not be safe," as the courts express it, to require a confession in such case.

The peril to the defendant at law here arises from the fact that by the confession at law, he waives his legal defense—the confessed judgment being a finality—and must, therefore, stake his entire defense on the equitable relief demanded. Should this fail, he is left without any defense, though he may have a good defense at law. Without such confession of judgment, should the relief in equity fail, he is relegated to his legal defense, which he still may make.

It is error, therefore, in such case, to require a confession of judgment. But where this has been erroneously required by the lower court, and the bill is subsequently dismissed and the injunction dissolved for want of equity, the court should dissolve the injunction only *on condition that the plaintiff at law withdraw his judgment and consent to re-open the case* and to re-instate it on docket, so as to give the defendant at law opportunity to try the case on its merits. And where the lower court refuses to do this, the decree will be reversed on appeal, and a proper decree to that effect entered by the appellate court. This was done in the case first cited.¹⁶

And even where the injunction order does not require a confession of judgment, yet, if the confession of judgment and the injunction are entered on the same day, the court of appeals will presume that the judgment was confessed, subject to the result of the equity proceeding.¹⁷

16. Great Falls Mfg. Co. v. Henry, 25 Gratt. 575; Dudley v. Miner, 93 Va. 408.

17. Staples v. Turner, 25 Gratt. 336. As to the jurisdiction in equity to enjoin a judgment at law on the ground of newly discovered evidence, and the practice in such cases, see Wynne v. Newman, 75 Va. 811.

CHAPTER XXVIII.

II. PARTITION OF ESTATES.

§ 302. **Equitable jurisdiction.**¹—The more convenient remedy afforded in equity for making partition of real property² has practically superseded former proceedings at law.

§ 303. **Procedure.**—The procedure in partition suits is by ordinary bill in equity, though to some extent regulated by statute.³

§ 304. **Venue of suit.**—Suit may be brought in any court of general equity jurisdiction in the county or corporation *wherein the land or any part of it lies.*⁴

1. *Parties.*

§ 305. **By whom suit brought.**—The statute declares that "*tenants in common, joint tenants and co-parceners shall be compellable to make partition; and any lien creditor or (of?) any owner of undivided estate in real estate may also compel partition for the purpose of subjecting the estate of his debtor, or the rents and profits hereof, to the satisfaction of his lien.*" Hence any of the parties named may maintain a bill for the purpose.⁵ And a life-tenant of one moiety, with remainder over, may maintain a bill for partition of the entire estate.⁶ And a guardian may maintain such a suit on behalf of his ward.⁷

1. Consult Virginia Code, Ch. 114; Freeman, Co-tenancy.

2. The statute makes provision also for the partition in equity of *goods and chattels*—by sale if necessary. Va. Code § 2569.

3. See Va. Code, Ch. 114.

4. Va. Code § 2652. Equity will not take jurisdiction of suits for partition of lands *in another state*. *Pillow v. Southwest, etc., Co.*, 92 Va. 144, reported, with note by Judge Burks, in 1 Va. Law Reg. 663.

5. *Id.* § 2562.

6. *Carneal v. Lynch*, 91 Va. 114, 50 Am. St. Rep. 819.

7. *Zirkle v. McCue*, 26 Gratt. 517. So plaintiff with legal title to the whole, but co-tenant of the equitable title with others, may have

§ 306. Necessary parties on partition in kind—consort of co-tenant—lien creditors.—The question of necessary parties to partition suits will depend somewhat on the ultimate outcome contemplated.

If the estate is to be *divided in kind*, clearly no interest of the consort of any co-tenant will be affected. On consummation of the partition, the contingent marital right of curtesy or dower, formerly attached to the undivided interest, will, by mere force of the partition, attach to the parcel in severalty.

And so, if there be *separate liens* or other charges on the undivided interest of any co-tenant, such liens or charges will *ex proprio vigore* follow the parcel assigned to the debtor co-tenant in severalty.

If, however, there be a *paramount charge* on the estate—as dower in the widow of the ancestor or grantor,—such widow should be made a party so that her dower may be assigned, and partition made of the residue.⁸

§ 307. Necessary parties continued—sale for partition—lienors.—Where, because of the inconvenience or impossibility of making partition in kind, the estate is to be *sold*, the question of parties becomes more important, for courts of equity are averse in any case to selling real property otherwise than *free of liens*; and in order that there may be a sale free of liens, all lienors must become parties to the suit. Such lienors

partition: *Hogan v. Taylor*, 110 Va. 9. And on bill for dower by the widow of a testator, one of the devisees may by *cross-bill* assert the right to partition, among the several devisees, and a sale if necessary, after assignment of dower: *Kavanaugh v. Shacklett*, 111 Va. 423. But where the plaintiff is not a co-tenant with the defendant—as where the defendant is in possession claiming the whole estate, and plaintiff claims an undivided interest through a wholly *different source of title* (a grant from the commonwealth)—a bill for partition will not lie, but the remedy is in ejectment. *Preston v. Va. Mining Co.*, 107 Va. 245. See *post*, § 310.

8. *Custis v. Snead*, 12 Gratt. 260. The same principle would seem to apply to any paramount charge, as a mortgage or other lien. See the following section.

should therefore either be made parties to the bill, or otherwise brought into the suit before decreeing a sale.⁹

§ 308. The same—consort of co-tenant.—On similar principles it would seem that the consort of a co-tenant should be made a party, so as to bar the contingent marital right. But it appears to be a settled principle that where the statute permits a sale for partition, the contingent marital interests of dower and curtesy, *by mere force of the statute*, are divested by the sale, even though the consort be not a party to the proceeding¹⁰—and as to the wife's contingent right of *dower*, the rule is made statutory in Virginia.¹¹

2. Miscellaneous.

§ 308. Leases or alienations by one co-tenant.—Where one co-tenant has aliened his own undivided interest, or any part of it, such alienee will, of course, be made a party to the suit, and proper allotment made.

So where there is a valid, *paramount lease* of all the interests, in the entire estate, or some definite portion thereof, the partition or sale must be made subject to the lessee's rights.¹² But since no one co-tenant can, without a proper agency, by his sole act of lease or alienation of the whole, or any definite portion, affect either the substantial rights of his fellows or their right of partition (in kind or by sale), it follows that any alienee or lessee of such co-tenant can claim no greater right than the grantor or lessor had; and although he should be made

9. The statute makes provision for securing the rights of lien creditors: Va. Code § 2564. See *Moon v. Highland Development Co.*, 104 Va. 551.

10. In analogy to condemnation proceedings. The question is well discussed in *Lee v. Lindell*, 22 Mo. 202, 64 Am. Dec. 262, and *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355. See *Freeman, Co-tenancy* 411, 474.

11. Va. Code § 2564. The statute, and the cases in the preceding foot note, apply the rule to the *wife* only—but, by analogy, it must be equally applicable to the husband's inchoate curtesy.

12. Va. Code § 2568.

a party to the suit, the partition or sale may be made as if such alienation or lease had not been made.¹³

§ 309. Combining partition with other relief.—Under the liberal provisions of the Virginia statute, the appellate court has held that *assignment of dower* may properly be united with a prayer for *partition*, whether the two purposes be sought in the original bill or the prayer for partition be presented in the cross-bill.¹⁴

And in a bill for partition of a trust-estate, relief may properly be prayed against a conveyance by the trustee to one of the co-tenants, alleged to be invalid because of fraud and the mental incapacity of the trustee.¹⁵

§ 310. Trying questions of legal title in partition suit.—The Virginia statute¹⁶ declares that the court “in the exercise of such jurisdiction may take cognizance of *all questions of law affecting the legal title* that may arise in any such proceedings, as well between tenants in common, joint tenants, and co-parceners, as others.”

This provision has been construed by the courts in most liberal spirit. While it is held that the right to a jury trial, on purely legal questions, cannot be taken away by extending the equitable jurisdiction, and hence that a partition suit may not be substituted for *ejectment* at law, yet that if the suit be *properly one for partition*, the court having jurisdiction for one purpose may proceed to give *complete relief*, even in matters of purely legal right. Thus, in *Pillow v. Southwest, etc., Co.*,¹⁷ followed in *Morgan v. Haley*,¹⁸ it is held that if the defendant, though *in ad-*

13. *Phillips v. Dulany*, 114 Va. 681; *Stark v. Barrett*, 15 Cal. 370.

14. *Kavanaugh v. Shacklett*, 111 Va. 423. See *Carneal v. Lynch*, 91 Va. 114. *Supra*, § 306, n.

15. *Seefried v. Clarke*, 113 Va. 365. See also *Laurel Creek, etc., Co. v. Browning*, 99 Va. 5—a suit for cancellation of lease and for partition.

16. Code § 2562.

17. 92 Va. 144—reported, with an instructive note by Judge Burks, in 1 Va. Law Reg. 663.

18. 107 Va. 331.

verse possession of the whole estate, is one who, in his own person or through his predecessors in title, was *once a joint owner with the plaintiff*, or with his predecessors in title, the whole question of the legal as well as the equitable rights of the parties may be threshed out in the partition proceeding.

3. *Partition in kind.*

§ 311. **The partition—where divisible in kind.**—If the property be divisible in kind, any co-owner has the right to insist that *the partition be so made*. The majority of the co-owners in such case may not insist on a sale against the will of any of their fellows.¹⁹

§ 312. **Partition in kind—how made.**—The primary question in every suit for partition is *whether a division in kind is practicable or not*. That such a division is not practicable may be apparent from the character of the property as described in the pleadings, or made to appear from the testimony introduced. So it may appear from the testimony that partition in kind is practicable.

But where the question is not thus settled, it is usual to have an order of reference to special commissioners named by the court—usually three or five,²⁰ and generally nominated by the parties—to ascertain whether a partition in kind be convenient and practicable, looking to the best interest of all the parties, or whether their interests will be promoted by a sale; and if partition be found practicable, to report to the court a scheme for dividing the estate as equally as possible among the several owners according to their respective interests. Equality here connotes not equality of *area* or acreage but of *value*.

Subject to the approval of the court the commissioners may *assign* the designated parcels to the parties, respectively, or may fix the designation by *lot*.²¹

19. *Custis v. Snead*, 12 Gratt. 260; *Howery v. Helms*, 20 Gratt. 1.

20. But this may be done through reference to a single master, if the court see fit, and no injustice appears. *Phillips v. Dulany*, 114 Va. 681.

21. *Cox v. McMullin*, 14 Gratt. 82.

The commissioners are usually required by the order to be first sworn to perform their duties impartially. They are required to go upon the lands to be divided, and are usually authorized by the court to employ a competent surveyor to lay off, by metes and bounds, the several parcels, making due provision for rights of way and other necessary easements, and to prepare a plat accurately indicating the location and description of each parcel. On the coming in of the report, the court will enter such decree as seems best for the interests of all parties.

§ 313. The same continued—modified partition—owelty.—Where the property is not susceptible of partition into parcels of precisely equal value, the court may direct a sale of part and partition of the residue; or inequality in the values of the several shares may be compensated by charging the more valuable parcels with a lien for a designated sum ("*owelty of partition*") in favor of those of less value.²² The shares of two or more of the co-tenants may be laid off together if they so desire.²³

4. Making title.

§ 314. How title made to the several parcels in partition proceedings—(1) in case of co-parceners.—By the unwritten law, on partition by *co-parceners*, even by parol, legal title to the several parcels is said to vest in the parties *without mutual conveyances*—the effect of the partition being merely to designate the parcels, and upon such designation title flows direct from the ancestor. Hence, on partition proceedings in equity, the decree was, and still is, itself sufficient, without mutual conveyances.²⁴

§ 315. The same—(2) in case of other co-tenants.—In order to vest legal title in severalty in the several co-tenants who are *not co-parceners*, by the unwritten law voluntary partition must have been consummated *by mutual conveyances*. And since the decree of a court of chancery cannot *ex proprio vigore* vest

²² Va. Code § 2564.

²³ Id. § 2563.

²⁴ Bolling v. Teel, 76 Va. 487; Wright v. Johnson, 108 Va. 855. See Freeman, Co-tenancy, 397-400.

or divest legal title, a decree for partition must have been consummated by like conveyances, either by the parties or by a master acting in that behalf.²⁵

§ 316. The same—statutory title.—To avoid the expense and inconvenience of mutual conveyances, the Virginia statute declares that the decree of partition shall vest in the respective parties the titles to their shares “in like manner and to the same effect as if the said decree ordered such title to be conveyed to them and the conveyance was made accordingly.”²⁶ The statute is in terms retrospective.

5. *Partition impracticable—Sale.*

§ 317. Where partition in kind impracticable.—Where neither a complete nor a modified partition in kind can conveniently be made, having due regard to the circumstances of each parcel and the interest of all parties, the court may decree a sale of the entire estate, and a division of the proceeds among the several co-owners.²⁷

§ 318. In case of sale—disposition of proceeds—infants.—As already mentioned, the statute²⁸ makes careful provision for the protection of lien-creditors, and of the rights of infants and lunatics.

If the dividend of the infant or lunatic exceed \$300, and be not held in trust, it is to be invested under the supervision of the court, and not paid over to the guardian or committee—but if less than \$300 it may be so paid over to the guardian or committee. If held in trust, the amount, whatever it be, is paid over to the trustee, but only on his giving proper security.

25. *Id.*

26. Va. Code § 2564. Provision is made, by § 2510, for the recordation of the decree. In *Wright v. Johnson*, 108 Va. 855, where the wife's parcel had been erroneously assigned by decree to her husband, not consummated by deed, it was properly held that legal title did not, by virtue of the statute, vest in the husband where the wife was a *co-parcener*—since the statute was not intended to operate to defeat an existing legal title.

27. *Id.* § 2564.

28. Va. Code § 2564.

The same—when and to what extent conversion occurs.

—As to those who are *sui juris*, the proceeds of the sale are regarded as personal estate from the time of confirmation of the sale. In the case of infants and lunatics,²⁹ their dividends are to be regarded as *real estate* as to so much as may remain unexpended at their death intestate and incapable of making a will—in short, until death or the removal of the disability.³⁰

CHAPTER XXIX.III. BILLS FOR NULLITY AND DIVORCE.¹

§ 319. **General equity jurisdiction.**—The jurisdiction of divorce and matrimonial causes, originally exercised by the English ecclesiastical courts, is now very generally exercised in America by courts of equity—in some particulars by inheritance, but chiefly by virtue of express statutory enactment.²

§ 320. **The same—in Virginia.**—In Virginia the circuit and corporation courts, on the chancery side thereof, are invested by statute³ with complete jurisdiction of suits for annulling or affirming marriages, and for divorce.

§ 321. **Essentials of jurisdiction in Virginia.**—It is important to observe that Virginia does not throw wide open the doors of her equity courts to all the world seeking relief from matrimonial bonds, as in cases where ordinary equitable relief is sought. But the statute⁴ conferring equitable jurisdiction of nullity and divorce suits, in terms, provides that no *nullity* or *divorce* suit shall be maintained in the courts of this state “un-

29. The statute includes married women also, but doubtless by inadvertence.

30. Id. §§ 2566, 2626.

1. See Va. Code Ch. 101.

2. 1 Bishop, Mar. Div. & Sep. 801-807.

3. Va. Code, § 2259.

4. Va. Code, § 2259.

less one of the parties has been domiciled in this state for at least one year preceding the commencement of the suit”—and no suit for *affirming a marriage*, unless one of the parties be domiciled here at the time of suit brought.

It is clear from such provisions that these requirements are *jurisdictional*, and must be alleged and proved as a condition precedent to the maintenance of the suit, or to the validity of the decree.⁵

§ 322. Venue in Virginia.—The proper venue of such suits is in the county or corporation (a) in which the parties *last cohabited*; or, (b) at the option of the plaintiff, in which the *defendant resides*, if a resident of this state; or, (c) if not a resident, in the county or corporation in which the *plaintiff resides*.⁶

§ 323. How suits conducted.—Such suits are instituted and conducted as other suits in equity, with the following exceptions: ⁷

- (1) The bill is *never taken for confessed*.
- (2) Whether the defendant appears or not the cause is heard *independently of the admissions* of either party, in the pleadings or otherwise.
- (3) Process may be served within the state only by a *duly*

5. *Yates v. Yates*, 115 Va. 678; 2 Bishop, Mar. Div. & Sep. 766, 1545-1546.

6. Va. Code, § 2259.

7. *Id.*, § 2260. The reasons for these exceptions are obvious. The first two exceptions named are to prevent collusion—an ever threatening evil in divorce proceedings. *Bailey v. Bailey*, 21 Gratt. 43. The third is to prevent breaches of the peace likely to occur if service of process were permitted by private persons—and also as a guaranty against a false return of service. As the average commissioner in chancery is usually a more dignified and more experienced person than the average notary or justice, he is deemed a more suitable person to preside at the taking of depositions in suits in which there is generally much personal bitterness between the parties, and their kindred and friends, and not infrequently shared temporarily by the respective counsel. Hence the fourth exception.

authorized officer—and not by a private individual as in ordinary cases.

- (4) Depositions taken within the state may be taken only by a *commissioner in chancery*.
- (5) Special provisions are made in connection with summoning the defendant by *order of publication*, as mentioned in the following section.

§ 324. Summons by publication.—Where the defendant is summoned by *order of publication*, the order may be issued either by the court or by the clerk in vacation, on written application therefor, in which the last known address of the defendant must be stated; and a *copy of the process must be mailed* to the defendant at his or her last place of abode,—the fact of such mailing to be certified by the clerk of the court. The order of publication is required to state the grounds upon which the suit is based. The taking of depositions may not be commenced until at least fifteen days after the order of publication shall have been completed.⁸

§ 325. Powers of the court pendente lite—suit money—temporary alimony, etc.—The court, in term, or the judge in vacation, has ample power⁹ during the pendency of the suit to compel the man (whether plaintiff or defendant) to provide means for the maintenance of the woman, and the custody and support of the infant children, and for the prosecution or defense of the suit; to protect by injunction her personal liberty against any restraint by him; to preserve, by injunction if necessary, the estate of the man, so that it may be forthcoming to meet any decree which may be made in the cause for alimony

8. Acts 1912, p. 170; Acts 1914, p. 29. The purpose of these special provisions is in furtherance of the policy of preventing fraudulent divorces, secured by inadequate efforts to bring home notice of the proceedings to the defendant—and possibly also to remove suggested doubts as to the legal sufficiency of a mere published summons in divorce cases, when extritorial recognition of the decree is sought. See *Atherton v. Atherton*, 181 U. S. 155; *Minor*, Conflict of Laws 89-94.

9. Va. Code, § 2261; *supra*, § 290.

or other purpose; or to compel him to give security to abide such decree.

These orders, or any of them, on a proper showing made, supported by affidavit, may be entered in vacation, and before the maturity of the suit—and, on like allegations and like verification, even before process served¹⁰ and without notice to the defendant, in analogy to a preliminary injunction. Indeed, most of such orders would in fact be equivalent to an injunction—mandatory or prohibitory—if not so in form and substance.¹¹

§ 326. The bill.—The bill in a nullity or a divorce suit is drawn in much the same form as other bills in chancery. The features of special importance in such bills, to which the attention of the young practitioner should be directed, are:

(1) In divorce suits, an allegation of the *actual marriage* of the parties, with particulars as to the date, place, etc.; together with the maiden name of the wife. Divorce is necessarily predicated on a previous valid marriage.

(2) The essential *jurisdictional* allegations, already noticed.¹²

(3) In case the wife is plaintiff and suit money or alimony is desired, some account of the *estate and income* of the husband.

(4) The number, names, sex and ages of the living *infant children* of the marriage.

(5) The *particulars of the matrimonial offense* with which the defendant is charged, and which is asserted as a ground of the divorce sought. It is important that the circumstances and nature of the offense or offenses be charged with sufficient particularity as to persons, time and places, to enable the defendant properly to prepare to meet the charges in his or her answer and to secure proper testimony in defense.

10. But apparently not before *process issued*—since the exercise of these powers seems, from the language of the statute, authorized only "*pending the suit.*" *Id.*

11. The statutory provisions here enumerated are largely declaratory of the unwritten practice. 2 Bishop, Mar. Div. & Sep. 462, 966-992, 1100-1113.

12. *Supra*, § 321.

§ 327. **The same—continued—how adultery charged.**—Thus, for example, where the gravamen of the bill is the adultery of the defendant, the allegations of *time* and *place* should be as specific as possible, and the *name of the paramour* stated, if known, and if unknown the bill should so allege.¹³

§ 328. **Decree of divorce—permanent alimony—custody of children, etc.**—The court has a wide discretion in the sentence of divorce, in making provision for permanent alimony to the innocent wife, for the custody and maintenance of the infant children, and for conserving the estate of the parties.¹⁴

And, even after final decree, on petition of either parent, the court may, from time to time, alter the decree so far as it concerns the custody maintenance of the children.¹⁵

13. In justice to the defendant, naming the paramour, if known, seems clearly essential; and the soundness of the rule is not doubted, in spite of *dicta* to the contrary in *Miller v. Miller*, 92 Va. 196, and *Farr v. Farr*, 34 Miss. 597, 69 Am. Dec. 406, and perhaps a few other cases, based on the suggestion that as the alleged paramour is not a party to the suit, and has no opportunity to be heard, the reputation of an innocent person might thus be scandalized. But this suggestion was anticipated long before by Dr. Lushington in *Croft v. Croft*, 3 Hag. Ecc. 310 (5 Eng. Ecc. Rep. 120), in the statement that “justice must be done to suitors, so that it is impossible to exclude” [from the pleading] “matter which ought to be admitted in evidence because incidentally it may affect the character and involve the conduct of those who are not parties to the suit.” Mr. Bishop declares the name of the paramour, if known, “the very gist of the description” of the adulterous acts charged. 2 Bishop, Mar. Div. & Sep. 1333. See *Id.* 1326 (form of allegation), and 576. See *Wood v. Wood*, 2 Paige 113; *Marsh v. Marsh*, 6 N. J. Eq. 391, 84 Am. Dec. 164; *Starke*, 2 Va. Law Reg. 69 (excellent discussion). As the name of the paramour, if known, must necessarily be brought out in the *testimony*, the privilege of omitting it from the *bill* is, after all, an illusory protection to the paramour at the expense of the defendant—thus presenting the anomaly of the judicial sacrifice of the rights of a litigant, in a vain effort to protect the reputation of a stranger.

14. Va. Code, § 2263. Alimony to a *husband* out of the wife’s estate was probably unknown to the common law. 2 Va. Law Reg. 308, 857; 3 *Id.* 60. The language of the Virginia statute cited seems broad enough to permit it in a proper case—if such a case should ever be presented.

15. This statute is likewise largely declaratory. See 1 Bishop, Mar. Div. & Sep. 1385-1392; 2 *Id.* 993-1037, 1115-1224, and *passim*.

CHAPTER XXX.

IV. SALE OF LANDS OF PERSONS UNDER DISABILITY.

§ 329. **Equitable jurisdiction—statutory.**—Whatever may be the rule in the case of lands of lunatics and persons *non compotes*, by the great weight of authority courts of equity have not inherent jurisdiction to sell, exchange, or incumber the lands of infants, unless the same are held in trust. In the latter case, under its long established jurisdiction over trusts generally, there can be no doubt of the ample power of equity to sell or otherwise deal with the trust estate, whether belonging to infants or adults.¹

Inasmuch as the welfare of infant owners of land often requires a sale or other disposition, statutes exist in probably all of the states conferring the necessary jurisdiction.

As the proceedings are, in general, statutory, the nature of these proceedings depends in large measure on the terms of the particular statute under which they are brought. But as the purpose of these statutes is everywhere the same, and the temptation the same for dishonest persons to take advantage of these helpless persons, much similarity of procedure will be found to exist in the several states.

In Virginia, statutes make detailed and carefully guarded provisions for the *sale, lease, exchange or incumbrance* of the lands of both infants and lunatics—including special provisions with respect to timber, coal, gas, oil, etc., on such lands.

§ 330. **The same—Virginia statutes—purposes of sale, etc.**—The statutes contemplate two purposes for which the jurisdiction in question may be exercised, namely, (1) where it is to the interest of the infant or lunatic that the property be converted into money for purposes of *reinvestment*—or exchanged for other property—or incumbered for the erection of buildings

1. *Shirkey v. Kirby*, 110 Va. 455.

or other improvements thereon;² and (2) where it is to the interest of the infant or lunatic that the property be sold for the purpose of expending the proceeds for the *maintenance of the lunatic or his family*, or for the *maintenance and education of the infant*.³

In brief, the first provision contemplates a mere change in the *form of the investment*—while the second contemplates the *expenditure of the proceeds* (that is, the principal or a portion thereof) for the benefit of the infant or lunatic.

§ 331. Sale of lands of infants, etc., continued—nature of estate.—The statute in express terms is applicable to estates of every character—the language being “whether the estate of the minor, insane person or of any of the persons interested, be absolute or limited, and whether there be or be not limited thereon any other estate, vested or contingent.”⁴

§ 331a. The same—limited estate in infant—absolute estate sold.—Where the estate of the infant in the subject-matter is a limited one, or is not a sole and absolute estate, the

2. Code, Ch. 117; Acts 1902-03-04, p. 842.

3. Va. Code, §§ 1703-1705, § 2609.

4. *Id.*, § 2616. Reference may be here made also to §§ 2432-2436 authorizing the sale of *contingent estates*, whether of infants or adults; § 2564 with respect to *partition* of estates, whether of infants or of adults; § 3641, sale of *infant's homestead*; §§ 2436a-2436b authorizing *life-tenants to maintain suits for a sale of the entire estate* for a reinvestment of the proceeds, whether the remaindermen be infants or adults, and whether the remainders be vested or contingent—held unconstitutional as to the involuntary sale of *vested* remainders belonging to persons *sui juris*: *Curtis v. Hiden*, 117 Va. 289; 7 Va. Law Reg. 544; §§ 2623-2624, authorizing the *wife of an infant or insane husband*, whose lands have been sold by decree under chapter 75 or chapter 117 of the Code, to *unite in the master's conveyance to release dower* or other interest, with provisions for securing proper compensation for the interest so released; § 2625 giving jurisdiction to courts of equity to provide for *releasing curtesy of insane husband, or dower of insane wife*, where the sane consort desires to sell his or her real estate; § 2618a, *validating proceedings for the sale of infants' lands* heretofore made to *bona fide* purchasers, though the required answers by infants under fourteen years of age were not filed as required.

powers of the court are not confined to a sale simply of the *infant's interest* in the estate, but the court in such proceeding may sell the *absolute estate*, though it may thus be disposing of the estate of adults as well as that of the infant.^{4a}

1. *Outline of the procedure.*

§ 332. **The same—outline of the procedure.**—The subjoined outline will indicate the chief features which must characterize the proceedings under these statutes.⁵ And as most of these provisions are mandatory, as presently to be shown, it behooves the young practitioner to give them his careful attention.

§ 333. (1). **Venue of suit.**—Suit must be brought in the circuit or corporation court of the county or corporation *where the land, or some part of it, lies.*

Since this is a purely statutory proceeding, under a statutory jurisdiction, and since, as will appear later, any material departure from the statutory requirements will oust the jurisdiction, the opinion may safely be expressed that the jurisdiction here cannot be exercised by the court of any other county or corporation than as here prescribed. Here *venue* and *jurisdiction* seem coterminous.^{5a}

§ 334. (2) **Proper plaintiff.**—The suit may be brought only (1) by *guardian* of the infant, or the *committee* of the lunatic,⁶ unless the property be *held in trust*, in which case suit may be brought by (2) the trustee, or (3) by *any person interested* in the estate.⁷

4a. *Faulkner v. Davis*, 18 Gratt. 652; *Rhea v. Shields*, 103 Va. 305, 309-310.

5. Proceedings for the sale of the lands of insane persons for maintenance, etc., under §§ 1703-1705, are somewhat less formal.

5a. As to process against infants and lunatics, and appointment of guardian *ad litem*, see *ante*, §§ 34-35.

6. It should be noted that the guardian or committee does not sue *in the name of the infant* or lunatic, but *in his own name*, as guardian or committee.

7. The latter clause would seem to confer the right on the infant (by his next friend) or the lunatic (by his committee) in the case the estate be *in trust*.

§ 335. (3) **Necessary allegations and characteristics of the bill.**—The bill must show that it is brought (1) by the *proper plaintiff*, (2) against the *proper defendants*; must (3) *describe the property to be sold, leased, exchanged or encumbered*; must state (4) the *character of the infant's or insane person's holding*—whether in trust or otherwise, and whether as sole owner or jointly with others named, and whether for life, in remainder, vested or contingent, or in absolute estate—(5) *the purposes to which the proceeds of the sale or encumbrance are to be devoted*; (6) *must state "plainly all the estate, real and personal belonging to such infant or insane person, or so held in trust;"* and (7) *"all the facts calculated to show the propriety of the sale, exchange, encumbrance or lease"*; (8) must indicate and make parties *all those who would be the heirs or distributees of the infant or insane person if he were dead*; (9) it should further allege that *the rights of no person will be violated by the decree sought*; and finally (10) the bill must be *verified by the oath of the plaintiff*.⁸

§ 336. (4) **Verification of bill.**—Ordinary bills in chancery require no verification—or, in the few cases where required, the verification may usually be made by any person cognizant of the facts. Here, however, to indicate good faith on the part of the plaintiff in his capacity as representative of the infant or insane person, the bill must be verified by *oath of the plaintiff*,⁹ and no substitute is permissible.

8. The reasons for requiring these details are obvious. The plain policy of the statute is that there shall be no conversion, complete or partial, or the real property of those who are under guardianship and unable to care for their own interests, except where such conversion is clearly to their interest. In order to determine this vital question, the court must be advised of all the circumstances surrounding the infant or lunatic and his estate, so as to be able intelligently to consider the whole situation, and afford complete protection to all parties concerned. Hence the detailed information called for.

9. In *Lancaster v. Barton*, 92 Va. 615, it was held that an affidavit which failed to show that it was made by the plaintiff, might be supplemented by proof *aliunde*, in a collateral attack on the decree of sale. See also *Durrett v. Davis*, 24 Gratt. 302, 310-311.

§ 337. (5) **Proper parties defendant.**—Not only must the infant or insane owner (when not a plaintiff as he may be where the estate is held in trust ¹⁰) and all other persons having a direct interest, be made parties defendant, but also all those who would be his *heirs or distributees if he were dead*.¹¹

§ 338. **The same—infants as heirs of each other.**—It not infrequently happens that several infants are interested in the same property, and having the same guardian or trustee, a single suit is brought in behalf of all. When such infants are brothers and sisters whose parents are dead, and who would therefore be heirs and distributees of each other, question arises whether the terms of the statute are complied with by making the infants *sole defendants*, or whether it is necessary also to make parties defendant those who would be the heirs or distributees of *all* the infants, *if all were dead*. Since one purpose of the statute in requiring the presence of the prospective heirs or distributees is that the infant parties may have the benefit of the oversight and protection of the former, and to prevent unfair advantage being taken either of the real owners, the infants, or of the possible and contingent owners, the heirs and distributees, it is at least advisable, in the absence of judicial sanction for the contrary practice, to make parties defendant *all those who would be heirs or distributees of all of the infant owners if all were dead*. The statute plainly contemplates two classes of defendants: (1) The infant or infants interested in *the first degree*, as the real parties in interest, and (2) those interested in *the second degree*, as prospective heirs and distributees. The statute uses the term “infant,” in the singular number, “all of those who would be *his* heirs, etc., if *he* were dead;” but it seems to

10. *Supra*.

11. Since the infant is incapable of making a will of realty before majority, and the insane person is wholly *incapax testandi*, the prospective heirs and distributees have a special (if not anxious) interest in maintaining the integrity of the estate. It is eminently proper, therefore, for the safeguarding of their own interests, as well as those of the infant or insane person, that these kindred should be made parties and given opportunity to be heard.

contemplate this application to a plurality of infants as well—"all those who would be *their* heirs, etc. if *they* were dead." ¹²

§ 339. (6) Guardian ad litem.—Before any steps are taken in the suit there must be a guardian *ad litem* appointed for the infant defendants.¹³

§ 340. (7) Required answers.—There must be the following answers—and *their presence in the record is mandatory*:

- (a) Answer of the guardian *ad litem* in proper person, and on oath.¹⁴
- (b) Answer of the *infant*, by the guardian *ad litem*, and (by the safer practice) under oath of the latter.¹⁵

12. Where father and mother, as trustees, are plaintiffs, they are properly in the suit as heirs and distributees of their infant children. *Lancaster v. Barton*, 92 Va. 615.

13. As to his appointment, service of process, etc., see *ante*, § 34. He has no power to make admissions, whether *in pais* or of record, which will bind the infant. He may not consent to a decree on the merits, or waive proofs. *Infra*, § 341; *Dangerfield v. Smith*, 83 Va. 81, 91; *Waterman v. Lawrence* (Cal.), 79 Am. Dec. 212. But he may consent to mere matters of procedure not affecting the substantial rights of the infant—as by consent to a hearing in vacation, etc. *Kingsbury v. Buckner*, 134 U. S. 678, 681; *Lemmon v. Herbert*, 92 Va. 653.

14. The various oaths required in these proceedings being demanded by the statute, are not the subject of waiver. The purpose of requiring an answer *in proper person from the guardian ad litem* (an innovation in the equity practice) is to have an expression of his personal knowledge of the facts alleged in the bill, and of the circumstances surrounding the infant, and of his judgment as to the propriety or impropriety of the sale or other object sought by the bill.

The purpose of the oath is not to afford evidence (as the case must be proved independently of the pleadings) but to guarantee good faith on the part of the guardian *ad litem*.

15. The statute does not in terms call for this answer, but as it is not usual or necessary in this state to serve process on infants, without such an answer the infant would not properly be a party to the suit—since he becomes a party in such case only by the filing of an answer in his own name by his guardian *ad litem*. The oath here is not in terms required—but, as the rules of the forum require

- (c) If the infant be over fourteen years of age: ¹⁶ Answer of the infant *in proper person*, and *on oath*.

§ 341. (8) **The evidence—depositions.**—The necessary facts must be proved by testimony of witnesses *independently of any admissions in the answers*. No depositions may be read unless taken *in the presence of the guardian ad litem*, or on interrogatories agreed upon by him.¹⁷

§ 342. (9) **The decree.**—"If it be clearly shown," declares the statute, "*independently of any admissions in the answers*, that the *interests of the infant, insane person, or beneficiaries in the trust, as the case may be, will be promoted*, and the court is of opinion that the *rights of no person will be violated thereby*, it may decree a sale of said estate, or any part thereof," etc.¹⁸

all answers to be verified, caution suggests that it be not omitted. See curative statute, § 2618a, indicating the necessity for such answers in the future.

16. This is a wise provision, giving the infant himself opportunity, after he has presumably reached some degree of mental maturity, to express his own judgment and wishes with respect to the proposed conversion of his property. If the infant be beyond the limits of the commonwealth, or insane, or confined in a reformatory or prison, the answer in proper person is not necessary. Acts 1904, p. 117.

17. See *Coleman v. Virginia Stave Co.*, 112 Va. 61, and *Wheeler v. Thomas*, 116 Va. 259, where the decrees were held void and subject to collateral attack, for a violation of the fundamental rule that the essential facts of a case, and particularly in these proceedings, may not be established by *ex parte* affidavits. Affidavits were rejected also in *Smith v. White*, 107 Va. 616.

The requirement here that the depositions must be taken in the *presence of the guardian ad litem* is not applicable to other suits in chancery in which there are infant parties. It is peculiar to the proceedings here under investigation. *Moore v. Triplett*, 96 Va. 603. The requirement of the *guardian ad litem's* presence here is an additional safeguard against wrong to the infant or lunatic—in that it at least brings home to the *guardian ad litem* the nature of the testimony to be submitted, and if he be faithful to his trust the testimony will be more thoroughly sifted.

- * 18. Va. Code § 2620. It is to these inquiries that the testimony will mainly be directed. The necessary facts may be established

§ 343. (10) **The sale.**—It is provided that the guardian *ad litem*, or the committee (of the insane person), or the trustee, shall not become purchasers or lessees, directly or indirectly.¹⁹

§ 344. (11) **The proceeds.**—Careful and minute provisions are made for the safe reinvestment or other proper disposition of the proceeds of sale, under the supervision of the court. The proceeds, representing as they do the *corpus* of the infant's real property, do not pass into the hands of the guardian, but are managed by a receiver or other person appointed by the court for the purpose, who is required to give ample security for the faithful discharge of his duties.²⁰

either by a reference to a master to ascertain and report them, or by depositions properly taken and read by the court. The statutory rule that a master's report must lie ten days for exceptions, is held (on not entirely satisfactory reasoning) to have no application to this proceeding. *Lancaster v. Barton*, 92 Va. 615. It is scarcely necessary to suggest that the decree should plainly indicate that the required conditions precedent were fulfilled—namely: "It being clearly shown, independently of any admissions in the answers, that the interests of the infant defendant will be promoted by what follows, and that the rights of no person will be violated thereby, the court doth adjudge, order and decree," etc.

19. *Id.* § 2621. As indicated in a subsequent section, though the interest of the incompetent be a partial or limited estate, the court may, and should ordinarily, decree a sale of the entire or *absolute estate*. *Supra*, § 331a. The court in such proceeding has jurisdiction to confirm a conditional sale of the property *privately made* on behalf of the beneficiary or beneficiaries, if satisfied by testimony, taken as required by the statute, that such sale is to the interest of the parties. *Smith v. White*, 107 Va. 616.

20. *Id.* §§ 2620, 2622. Where the proceeds of the interest of any infant are *less than one hundred dollars*, the court may decree payment thereof directly to the infant, or to one of the parents for his benefit: § 2622a. Should the infant or insane person die during non-age, or without recovering his sanity, such of the proceeds of his real estate sold under this chapter, or under chapter 114, as may remain at his death, are to pass to his heirs as if the fund were *real property*: § 2626.

The provisions of § 2620, with reference to the repayment of incumbrances authorized by that section, seem to afford quite inadequate protection to the lender—whose lien seems confined to the *increment of value* produced by the improvements made, and subordinate to the right of the infant to demand, out of the proceeds of

2. *Interpretation of statute—When liberal—When strict.*

§ 345. **Interpretation of these statutory provisions—(1) liberal as to subject-matter.**—As these provisions are meant to supply a need for which the unwritten law did not provide, and are highly remedial in their nature, they are to be liberally construed in support of a clearly defined legislative policy, so far as concerns the *subject-matter* of the several statutes.²¹

§ 346. **Interpretation continued—(2) strict as to procedure.**—In supplying a right which the common law did not afford, the legislature, in providing the proper machinery for its exercise, has been careful to place every reasonable safeguard around the helpless persons whose inheritances are thus permitted to be aliened or encumbered without their concurrence, and who are without ability to protect their own interests.

As a purely statutory right, it must, in accordance with the settled rule of construction, be exercised in substantial compliance with the *statutory remedy*—and any material departure from the procedure as prescribed by the legislature will render the proceeding not only voidable but *void*, and therefore subject to collateral attack. The exercise of this jurisdiction by courts of chancery is not under their *general* equitable jurisdiction, but under a *special, statutory* and *limited* jurisdiction—and a failure to exercise the power substantially as given will be fatal to the proceedings.²²

sale, an amount equal to the *original value of the estate* anterior to the execution of the incumbrance. Such an investment will scarcely prove attractive to careful investors.

21. *Faulkner v. Davis*, 18 Gratt. 651, 669-670; *Rhea v. Shields*, 103 Va. 305; *Coleman v. Virginia Stave Co.*, 112 Va. 61.

22. *Williamson v. Berry*, 8 How. (U. S.) 495; *In re Valentine*, 72 N. Y. 186; *Battell v. Torrey*, 65 N. Y. 296; *Roche v. Nesters*, 72 Md. 264, 7 L. R. A. 533; *Coleman v. Virginia Stave Co.*, 112 Va. 61. See *Rhea v. Shields*, 103 Va. 305, 313—a case in which the court found the trustee plaintiff and his counsel guilty of gross imposition upon the *cestuis que trustent* under cover of these statutes, but was unable to give relief because the proceedings were substantially regular, and the property had passed into the hands of *bona fide* purchasers. "The developments in this case" said Whittle, J., "accentuate the neces-

It should be observed, however, that these statutes have in no wise affected the ancient jurisdiction of equity over *trust estates*, even though held by infants. If, therefore, the estate be in trust, the jurisdiction to decree a sale when the interests of the beneficiaries require it, is not dependent on these statutes, which merely afford an additional remedy. Hence trust estates of infants or insane persons may be sold or encumbered under decree of the court of chancery without complying with the statutory proceedings.^{22a}

3. *The title of a bona fide purchaser.*

§ 347. The same—how far bona fide purchasers protected.—The principle here is well expressed by Buchanan, J., in *Coleman v. Virginia Stave Co.*:²³ "While the purchaser at such a sale is not bound to investigate the truth of the matters stated in the bill and deposed to by the witnesses, touching the estate owned by the infants, or as to the propriety or necessity of the sale, since his title cannot be affected because the case made by the record happens not to be warranted by the facts, (*Durrett v. Davis*, 24 Gratt. 302, 308), yet he is required to see to the *regularity of the proceedings* upon which the jurisdiction of the court is founded (s. c.); for he is presumed to know that the infant until six months after his maturity has the right to show cause against the decree of sale, for errors upon the face of the record, or to show that the court had no jurisdiction to enter the decree, or, if it had jurisdiction, that the proceedings were irregular and not binding upon the parties, or that the case made by the record did not warrant the decree."²⁴

sity for the exercise of such vigilance on the part of trial courts, in dealing with this class of cases, as will render the recurrence of similar results impossible; otherwise a benign statute specially enacted for the protection of the unfortunate may be converted into an instrument for their destruction."

^{22a} *Shirkey v. Kirby*, 110 Va. 455, 457. *Sed quere.*

²³ 112 Va. 61, 77.

²⁴ In this case there was almost a comedy of errors—though to the purchaser, who lost both his purchase-money and the property purchased, it was more nearly a tragedy. The bill failed to mention what other property the infants owned, there was no answer by the guardian *ad litem* in proper person, and affidavits instead of dep-

§ 348. Right of infant to show cause against the decree.—Under a long-settled rule of the chancery courts, infants have six months after attaining their majority within which to assail the validity of decrees affecting their rights—a privilege which formerly it was error not to reserve to them on the face of the decree, but now reserved to them by statute in Virginia, even though omitted from the decree.²⁵

§ 349. Special statutory protection of purchasers—sale six months after decree.—By special statutory provision in Virginia, if a judicial sale be made after six months from the date of the decree, and the sale be confirmed, though such decree be afterwards reversed or set aside, the title of the purchaser is not affected by such reversal; "but there may be a restitution of the proceeds of sale to those entitled."²⁶

This statute is applicable to sales of the lands of persons under disabilities, discussed in the foregoing sections; and when precaution is taken to await the expiration of six months before making the sale, purchasers are assured of their titles, though the infant may afterwards succeed in having the decree reversed.²⁷

sitions were resorted to to show the propriety of the sale. For these and other irregularities, the decree was successfully assailed by one of the infants, in an independent suit against the purchaser of the property—the court holding that the decree was void. The case of *Wheeler v. Thomas*, 116 Va. 259, illustrates even greater irregularities, with like fatal results.

25. Va. Code § 3424. The cause or causes which may thus be shown as against a *bona fide* purchaser of the property sold under the decree, are indicated in the foregoing section—and are confined, in the main, to matters affecting the *jurisdiction* of the court, the *regularity of the proceedings*, and the *good faith* of the purchaser, and always to matters existing at the time of the decree of sale, and do not extend to circumstances subsequently arising. *Durrett v. Davis*, 24 Gratt. 302; *Zirkle v. McCue*, 26 Gratt. 517, 527; *Lancaster v. Barton*, 92 Va. 623; *Coleman v. Virginia Stave Co.*, 112 Va. 161.

26. Va. Code § 3425.

27. *Cooper v. Hepburn*, 15 Gratt. 551; *Dixon v. McCue*, 21 Gratt. 373; *Lancaster v. Barton*, 92 Va. 615. The effect is to substitute the proceeds of sale for the property sold, and to confine the subsequent litigation to these proceeds, and thus completely to protect the purchaser in his title. See Report of Revisors, Code 1849, p. 878.

CHAPTER XXXI.

V. CREDITORS' BILLS.

§ 350. Creditors' bills—distinctive feature.—The distinctive feature of a creditors' bill is that its purpose is not, as in an action at law, to obtain a personal judgment or decree against the debtor, but *specifically to charge the debtor's property*. It is a settled principle both of law and equity (save where the rule is changed by statute, as has been done in a few cases—as in attachment proceedings), "that every debtor, until his property is specifically bound to the satisfaction of his debt by his own agreement or by some judicial or other legal proceeding, has an absolute right to dispose of it at pleasure; a power which no tribunal whatever has authority to control or limit. The obligation of a debtor is purely personal, and in no way affects his property or any portion of it. To this rule no solitary exception can be found, nor can one exist, until the principles of our law are so changed as to authorize courts of equity to administer the estates of living persons as if they were dead."¹

§ 351. The same—distinctive feature continued.—Since, therefore, one's property, in absence of his contract, or of a trust, or of statute to the contrary, can only be charged through his person, courts of equity refuse to entertain bills thus to charge a debtor's property, unless the debtor himself has already voluntarily charged it in favor of the creditor, or unless the charge grows out of a trust, or of a statute, or, in the absence of these, unless the creditor has proceeded against the person of the debtor at law, and has exhausted all his legal remedies against him. The usual proof required to establish the exhaustion of legal remedies is a judgment on which execution has been issued and returned no effects.

1. Green, J., in *Tate v. Liggatt*, 2 Leigh 84, 99-100. To the same effect, Carr, J., in *Rhodes v. Cousins*, 6 Rand. 209, 211.

It follows that if the claims asserted in the bill are not already specific charges upon the property of the debtor, there must be such judgment, execution and return.

We may say, therefore, that the distinctive and essential feature of a creditors' bill is that its purpose is, in general, (1) to subject the debtor's estate, or some part of it, to a specific and existing charge thereon—for the enforcement of which charge there is no convenient remedy at law; or (2), to obtain the aid of the court in subjecting to the satisfaction of the plaintiff's judgment upon which execution has been issued and returned no effects,² the whole or some part of the debtor's estate, which, because of its equitable nature or otherwise, cannot be reached by execution at law.³

2. By virtue of statute in Virginia (Va. Code § 3571) the lien of a judgment on real property may be enforced in equity without issuance or return of the execution. *Price v. Thrash*, 30 Gratt. 315; *Stovall v. Border Grange Bank*, 78 Va. 188.

3. See generally on the subject: *Tate v. Liggatt*, 2 Leigh 84; *Spindle v. Fletcher*, 93 Va. 186; *Freedman's Bank v. Earl*, 110 U. S. 710; *Cates v. Allen*, 149 U. S. 451; *Guggenheimer v. Lockridge*, 39 W. Va. 457; note to *Suckley v. Rotchford*, 12 Gratt. 72 (Va. Rep. Ann.); *Flemming v. Grafton*, 54 Miss. 79; 12 Cyc. 1; note 63 L. R. A. 673; note 90 Am. Dec. 288-300; Lile, Notes on Equity Jurisprudence, 163 *et seq.*; cases *infra*.

There has been diversity of opinion as to whether equity would assume jurisdiction of a bill by an execution creditor to subject *choses in action* or other equitable estate of a living defendant, where no trust was involved, and where, under the local statute, the lien of the judgment or of the execution did not extend to the *chose*, or to the equitable interest in question. The jurisdiction was repudiated in a learned opinion by Chancellor Walworth, in *Donovan v. Finn*, 1 Hopkins Ch. 59, reported with an annotation collecting the authorities *pro* and *con*, in 14 Am. Dec. 531. See *Freedman's Bank v. Earl*, 110 U. S. 710, *contra*. This case is discussed *infra*, § 360, n. 15.

The question has become of less importance under the influence of modern statutes of attachment and garnishment, and statutes extending the lien of judgments or executions practically to every property interest possessed by the debtor—thus removing question of the equitable jurisdiction in such cases beyond the field of debate. See Va. Code §§ 3567, 3571, 3601.

1. *Bills by general creditors.*

§ 352. **The same—bills by creditors at large—exceptional cases.**—While the rule is, as shown in preceding sections that creditors at large cannot be entertained in equity for the subjection of their living debtor's estate to payment of debts, there are a few exceptions as the result of necessity or of statute. Thus, as indicated more at large in a subsequent section,⁴ statutes in some of the states permit such creditors to assail *voluntary* or *fraudulent* transfers of property by their debtor.

It is held also that where a *corporation is insolvent*, and has been *abandoned by its officers and agents*, creditors at large may maintain a bill for the conservation of its assets and their application to payment of debts.⁵

It follows, save in exceptional cases, that creditors at large⁶ of a living person,⁷ or of an existing corporation,⁸ cannot maintain a creditors' bill.

§ 353. **Bills by general creditors, continued—assailing fraudulent conveyances.**—In the absence of an enabling statute, creditors at large cannot maintain a bill to assail conveyances made by their debtor in fraud of creditors. If the claims are not already specific charges on the property, there must be judgment and execution returned *nulla bona*.⁹

4. *Infra*, § 354.

5. *Finney v. Bennett*, 27 Gratt. 365; *Nunnally v. Strauss*, 94 Va. 235. And so, where, by reason of the dissolution of the corporation no action at law can be maintained against it (in absence of an enabling statute). *Pullman v. Stebbins*, 51 Fed. 20. And see *Attachment in Equity*, post, Ch. xxv.

6. That is, creditors who have not reduced their claims to judgment, or who are not otherwise *in rem* creditors.

7. Where the debtor is *dead*, all debts created in his lifetime necessarily become specific charges on his estate—that is, *in rem* claims—since, they can no longer be asserted *in personam*. The jurisdiction of equity, therefore, to maintain creditors' bills for an accounting from the personal representative and heirs, and the payment of the decedent's debts out of his estate, is unquestioned.

8. *Va. Pass. & Power Co. v. Fisher*, 104 Va. 121; *Hollins v. Brierfield Coal Co.*, 150 U. S. 371.

9. *Tate v. Liggatt*, 2 Rand. 84 (full discussion); *Cates v. Allen*, 149 U. S. 449 (federal equity jurisdiction declined, though authorized by state statute); *Fleming v. Grafton*, 54 Miss. 79.

In some of the states (among them Virginia and Mississippi) statutes have been enacted expressly authorizing creditors at large to maintain such suits.

§ 354. The same—fraudulent conveyances—the Virginia statute.—By the Virginia Code¹⁰ it is provided that creditors may file a bill to set aside voluntary or fraudulent conveyances by their debtor, not only before obtaining judgments at law, but *even before their debts have matured*.

The statute further fixes the priorities of the different creditors by declaring that the plaintiff shall have a lien from the time of bringing his suit; and a petitioning creditor from the time of filing his petition (in court or in the clerk's office). But these priorities are declared conditioned upon filing notices of *lis pendens* in form and manner as the statute directs.¹¹

2. Proper parties.

§ 355. Creditors' bills continued—proper plaintiffs.—Any creditor whose claim presents the essential characteristics indicated in the preceding sections, may file a creditors' bill to subject any of the property of his debtor liable to be thus charged.

Such a bill may be filed by a single creditor for his own benefit—or several creditors may unite in the same bill, howsoever disconnected their several claims, provided the claims are chargeable on the same estate—or, again, one or more creditors may file the bill “on behalf of themselves and all other creditors similarly situated, who may come in and contribute to the costs of the suit.”

Where the bill is thus filed on behalf of the plaintiffs and others who may come in, it is known as a *general creditors' bill*. But although filed on behalf of the plaintiffs only, if it appear that there are other creditors who are entitled to enforce spe-

10. § 2460.

11. For a more detailed notice of this statute, and for a form of *lis pendens*, see the author's Notes on Equity Jurisprudence, pp. 97 *et seq.*; 1 Va. Law Reg. 294.

cific charges upon the subject-matter, they will be permitted, and sometimes required, to come into the suit, which will then, so far as the proceeding is concerned, be treated as a general creditors' bill.^{11a}

The reason for thus sanctioning the assertion of diverse claims in the same suit, in apparent violation of the strict and salutary rule of equity pleading that bills must not be multifarious—tantamount to a misjoinder at law—is, that the purpose of the creditors' bill is completely to administer the assets or estate against which the proceeding is directed, and hence all who are entitled to share in the distribution are proper, and in many instances necessary, parties to the suit.¹²

§ 356. The same—parties defendant.—As a general rule, it is not necessary nor, indeed, proper, to make other creditors parties defendant; but the debtor himself, and all other persons having a legal or equitable interest in the estate sought to be subjected, other than creditors, are necessary or proper parties defendant. As we shall hereafter see, creditors not named in the bill may become parties by petition, or by proving their claims under the order of reference.

Where, however, the legal title to the subject-matter is outstanding in one or more of such creditors, or in a trustee in his or their behalf, it is at least proper, and the better practice, to make such title-holder a party defendant—since the court must needs have control of the legal title, particularly where the subject-matter consists of real property.

§ 357. The same—how other creditors become parties.—Creditors, not otherwise appearing as parties plaintiff or defendant, may come into the suit either by petition, or by proving their claims before the master under the order of reference.

It seems scarcely necessary to add that the right thus to come into the suit, after bill filed, is confined to those creditors whose claims are of such a nature that they might have been asserted

11a. See *Order of Reference*, *infra*, § 358.

12. *Almond v. Wilson*, 75 Va. 613; *Freedman's Savings Bank v. Earle*, 110 U. S. 710.

by original bill—save where under special circumstances the order of reference otherwise directs.

Thus where judgment creditors of A, a living person, have instituted a creditors' suit to subject the debtor's real property, no creditor at large could assert his claim therein.

3. *Order of reference—Priorities.*

§ 358. Creditors' bills continued—order of reference.

—In a creditors' suit the court assumes the administration of the entire estate or fund on which the claims asserted are chargeable. For that purpose the cause is referred to a master for an account, if necessary, of the assets to be administered in the proceeding, the amount of the several claims charged or properly chargeable on such assets, and the respective priorities, if any, of such claims, together with such other facts and inquiries as the court may direct, or the master deem necessary, for a proper disposition of the cause. We shall see something more of the order of reference in a later section.¹³

§ 359. The same—distribution of proceeds—priorities.

—So far as concerns creditors who have *existing liens* before bill filed (and, as before stated, cases are comparatively rare where the situation is otherwise), their priorities are in no wise affected as the result of the suit brought. Where, however, the plaintiffs' liens arise only *by virtue of the suit*, (as by attachment, or proceedings to set aside fraudulent conveyances under the Virginia statute referred to above) such liens are necessarily inferior to prior valid incumbrances. That is to say, if A has first lien and B second, the priority of these liens is not affected by the circumstance that C takes the initiative by filing a creditors' bill—whether C is already a lien creditor inferior to A and B, or whether his lien accrues by virtue of his suit.

Nor, doubtless, would the result have been otherwise had A,

13. *Infra*, §§ 366-371. The Virginia statute requires the master to report delinquent taxes on the property of the debtor: Va. Code § 3397a.

the superior lienor, instituted the suit on behalf of himself and other creditors similarly situated.¹⁴

But where there is *no existing lien* before bill filed, and the lien arises only out of the equitable consideration of the plaintiff's vigilance and prior suit—as occasionally happens—then the question of priority becomes important.

§ 360. The same—priorities continued.—Where, as in the case last mentioned in the preceding section, the liens of the various creditors arise *only upon the filing of the bill* or of the bringing of the suit,¹⁵ or otherwise asserting the liens, the rule is that the plaintiffs in the bill, as a reward for their vigilance in the discovery of the equitable subject-matter, and their diligence in instituting the proceedings at their own expense and risk, are entitled to priority over all other creditors “similarly situated”—though still postponed, as before indicated, to creditors with *prior existing liens*. But if such plaintiffs (creditors at large) sue not for their own benefit only, but on behalf of other creditors *in simili casu*, thereby making the bill, at the outset, a *general* creditors' bill—then, having invited the other creditors to

14. Here A's invitation is in terms to other creditors “similarly situated”—and it would seem scarcely equitable to deem him to have waived any priority to which he was entitled, by an invitation in this form to other creditors.

15. These expressions are substantially synonymous under the general equity practice—since the filing of the bill and the issue of the *subpæna* are usually contemporaneous steps; the filing of the bill, with prayer for *subpæna*, being the only method of obtaining the *subpæna*. Hence the language of the books on equity procedure, and in the opinions of the courts, in declaring that the lien arises from the *filing of the bill*, connotes the *bringing of the suit*. It happens that in Virginia the issuing of the *subpæna* may precede the filing of the bill. In *Wallace v. Treagle*, 27 Gratt. 479, the court described the lien of the plaintiff-creditors at large as arising from the “filing of the bill,” (apparently overlooking the circumstance that the *subpæna* might have been issued months before) and thus, doubtless unintentionally, creating a departure in Virginia from the accepted rule.

To obviate any difficulty on this score, the Revisors have wisely provided by statute that the lien in suits to set aside fraudulent conveyances shall arise from the “bringing of the suit.” Va. Code § 2460.

share the burden of the suit, the plaintiffs are held impliedly to have agreed to share the benefits also. Hence, in the latter case, all the creditors who come in, whether as original plaintiffs, or by petition, or under the order of reference, share *pari passu* in the proceeds.¹⁶

16. In *Wallace v. Trackle*, 27 Gratt. 479—a case not clearly reported,—a single plaintiff appears to have sued on behalf of *himself and of several other creditors specifically named*—a very unusual proceeding, and one probably not warranted by rules of equity pleading. The court appears to have treated all four as plaintiffs in the case. The suit was not a general creditors' suit, and its object was to set aside several conveyances made by the common debtor as a fraud on creditors. It was held that the fund should be applied: (1) to prior judgment liens, in the order of their accrual; (2) to the claims of the plaintiffs, arising from the filing of the bill; and (3) to claims of other creditors asserted later, by petition or under the order of reference, and in the order in which such claims were filed.

The question whether the phrases "filing the bill" and "bringing the suit" are synonymous, is discussed in the preceding footnote.

In *Freedmans' Bank v. Earle*, 110 U. S. 710, the opinion by Mr. Justice Matthews contains a most instructive review of the history and present status of proceedings by creditors to reach the equitable estate of their debtor. In that case the bill was filed by a judgment creditor to subject the equity of the debtor in real property incumbered by a prior deed of trust. Under the existing law of the forum (the District of Columbia) neither the judgment nor the execution was a lien, legal or equitable, on the equity of redemption, but (as held) such equity constituted equitable estate which the judgment creditor might subject in equity. The bill was not in form a general creditors' bill, but was filed solely in the interest of the plaintiff. Other judgment creditors subsequently came into the suit, and sought to share the proceeds ratably with the plaintiff. It will be observed that this was a case where the lien arose *only upon the filing of the bill*. The court held that the proceeds of sale should be applied (1) to the existing lien under the deed of trust; and (2) to the plaintiff's judgment as a superior claim to the claims of those creditors who came later into the suit. "It is to be noted, therefore," said the court, in speaking of creditors' suits, "that the proceeding is one instituted by the judgment creditor *for his own interest alone, unless he elects to file the bill also for others in a like situation*, with whom he chooses to make common cause; and as no specific lien arises by virtue of the judgment and execution alone, the right to obtain satisfaction out of the specific property sought to be subjected to sale for that purpose, dates from the filing of the

On the other hand while no other than lien creditors can file a bill to wind up the affairs of an insolvent partnership, yet inasmuch as the partnership affairs cannot be completely settled without payment of all the debts, so far as the assets are sufficient for that purpose, the order of reference will usually make provision for the proof of all firm liabilities, whether in judgment or not. And so in the case of the winding up of an insolvent corporation.¹⁷ These exceptions obviously arise from the necessities of the case.

4. *Effect of the order of reference.*

§ 361. The same—general effect of an order of reference.—Usually the first decree entered in a creditors' suit is one of reference to a master for an account of all property and assets properly chargeable with the claims asserted, and of the respective amounts and priorities of such claims.

Such an order operates as a declaration on the part of the

bill. 'The creditor' says Chancellor Walworth, in *Edmeston v. Lyde*, 1 Paige 637, 640, 'whose legal diligence has pursued the property into this court, is entitled to a preference as the reward of his vigilance,' and it would 'seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination, should in the end be obliged to divide the avails thereof with those who have slept upon their rights, or who have intentionally kept back that they might profit by his exertions when there could no longer be any risk in becoming parties to the suit.' As his lien begins with the filing of the bill, it is subject to all existing incumbrances, but is superior to all of subsequent date." See also the opinion of Chancellor Kent in *McDermutt v. Strong*, 4 Johns. Ch. 687, where the same doctrine is expounded.

The case of *Johnson v. Waters*, 111 U. S. 640, illustrates the converse situation. There the plaintiff sued on behalf of *himself and all other creditors similarly situated*, to set aside certain conveyances of the debtor's lands in fraud of creditors, and to subject the lands to the plaintiff's judgment. The judgment in question was *not a lien before suit brought*. It was held that by suing on behalf of himself and all other creditors, the plaintiff had *waived priority over other creditors* who should come in; and that in case of deficiency of assets the fund should be distributed *ratably* among all the creditors who came into the suit. Compare § 354, *supra*.

17. See *supra*, § 352.

court that it will assume administration of the debtor's assets for the benefit of all creditors whose debts are properly chargeable thereon, and who may come into the proceeding. Hence though the suit may originally have been solely for the purpose of asserting a single lien on behalf of the plaintiff, an order of reference for an account of liens converts the suit into a general creditors' suit.¹⁸

The effect of such an order is of more significance than appears on its face, namely: (1) It operates to convert the suit into a general creditors' suit, and thus to deprive the original plaintiff or plaintiffs of the further *dominion of the suit*; (2) It operates as an *injunction* against the institution of other creditors' suits against the same debtor to subject the same assets, and *suspends all other pending creditors' suits* of the same character; and (3) It suspends the running of the *statute of limitations* on all claims provable in the suit, and thereafter actually asserted therein.

§ 362. Order of reference continued—(1) Effect on dominion of suit.—For reasons indicated in the preceding section, the entry of an order of reference converts the suit—which up to that time is merely the suit of the plaintiff or plaintiffs in the original bill, over which they have complete dominion, and may dismiss at will—into a suit for the benefit of *all creditors similarly situated*, whether they have already come in or not, and transfers the dominion of the suit to the creditors as a whole, thus depriving the original plaintiff or plaintiffs of their former right to dismiss the suit.¹⁹

§ 363. The same—(2) Effect on other creditors' suits.—Since it is impossible, in the nature of things, to administer a single estate or fund in several independent suits, and in view of the general effect, already indicated, of an order of reference as an assumption of the jurisdiction to administer the estate or fund, (in effect, a *quasi partition* among creditors) it follows that

18. *Simmons v. Lyles*, 27 Gratt. 922, 928, *per* Staples, J.; *Shultz v. Hansbrough*, 33 Gratt. 571, 578, *per* Burks, J.

19. *Piedmont Life Ins. Co. v. Maury*, 75 Va. 508; *Hirshfield v. Fitzgerald*, 157 N. Y. 166, 46 L. R. A. 839, note.

should any other court thereafter, although in an already pending suit, assume the same jurisdiction, there would necessarily be a conflict of jurisdiction, which could only be removed by the surrender of jurisdiction by one or the other of the courts. To prevent such a conflict, the rule has been established that the court *first entering the order of reference* retains the sole jurisdiction. It follows that no other similar proceedings can be maintained elsewhere. Hence the first order of reference operates as an *injunction against the institution of other creditors' suits against the same estate or fund, and suspends further proceedings in other pending creditors' suits, instituted for similar purposes*, whether in the same court or in different courts.

It follows also from this, that the general rule that as between conflicting jurisdictions in the same State, priority of jurisdiction is acquired by that court in which the proceeding is first instituted, is inapplicable to creditors' suits; and that *priority of jurisdiction here is acquired by that court which first enters the order of reference.*²⁰

§ 364. The same—(3) Effect on the statute of limitations.—As a natural consequence of the foregoing, such a decree has the further effect of suspending the statute of limitations as to all creditors *whose claims are properly provable in the suit, and who actually come into the suit.*²¹

This consequence results from the rule that an injunction against suit on a contract, or other claim, suspends the running of the statute of limitations—as does also the pendency of a suit for the enforcement of the claim. By the entry of the order of reference, other suits are enjoined, and the main suit

20. *Kent v. Cloyd*, 30 Gratt. 555; *Bilmeyer v. Sherman*, 23 W. Va. 637; *Craig v. Hoge*, 95 Va. 275; *Buck v. Coldbath*, 3 Wall. 334. The same effect follows on the appointment of a receiver in a creditors' suit. *Post*, § 404.

21. *Callaway v. Saunders*, 99 Va. 350, 7 Va. Law Reg. 40, note. See *Richmond v. Irons*, 121 U. S. 27; *Jackson v. Hull*, 21 W. Va. 612; 1 Daniell, Ch. Pr. 643.

becomes, in theory, one for the enforcement of all claims properly provable—even those not as yet actually asserted.

§ 365. **Several bills pending—practice.**—The practice where there are several creditors' bills pending to subject the same *res* is explained in *Stephenson v. Taverners*:^{21a} "Where there are several such suits pending at the same time," says Moncure, J., "it seems the decree for an account of outstanding claims 'may be made in the cause which is first ripe for a decree, whether that cause was first commenced or not; and when the decree is made in the younger suit, then the proceedings in the elder suit must be stayed.' *Ross v. Crary*, 1 Paige 417, note (a)."

5. *Necessity of order of reference.*

§ 366. **Account of liens—necessity of order of reference.**—Before decreeing a sale of real property at the suit of lien-creditors, the policy of courts of equity is to convene all lien-holders; to ascertain definitely the amounts of the several liens, with their respective priorities; and to obtain precise information as to location and description of the property or properties owned by the debtor and against which the proceeding is directed.

§ 367. **The same—advantages—(1) sale free of liens.**—The enforcement of this policy accomplishes several important and beneficial results: (1) The convention of all lien-holders enables the court to sell the property *free of liens*—thus encouraging prospective purchasers to bid more freely than they would do if obliged to bid blindly, and to accept title subject to unknown and unascertained liens not represented in the suit. Thus the debtor, as well as his creditors, is benefitted by a more advantageous sale.

§ 368. **The same—(2) enabling lien-holder to bid intelligently.**—*The fixing of the priorities* enables each creditor to know precisely the aggregate of all liens superior to his own,

^{21a} 9 Gratt. 398, 406-407. It seems not unusual to consolidate such causes. See *Consolidation of Causes*, ante, Ch. xix.

and therefore, if he desires to become a bidder at the sale in order to save his own debt, he may do so intelligently. Here, again, by encouraging creditors to bid, the prospects of an advantageous sale are increased.

§ 369. The same—(3) defining the res.—*Precise knowledge of the location and description of the res* which the court is to administer is manifestly necessary in all judicial proceedings. The homely maxim of equity is that it “will never sell a pig in a bag.”

§ 370. Order of reference continued—when essential.—In pursuance of the policy referred to, the settled practice in equity is to refuse to decree a sale of real property where the record indicates that there are conflicting liens, or liens of unascertained or disputed amounts, or an absence of certainty in the location or description of the subject-matter of the sale. And for disregard of this rule the decree will be reversed on appeal. The rule does not depend on the *character* of the lien or liens asserted in the bill, but on the *uncertainty* in one or more of the particulars mentioned, namely, in the *amount or amounts due*, in the several *priorities*, or in the *subject-matter*,²² or in some other matter likely to operate as a clog upon the bidding.

So far is this policy carried of requiring certainty in these several particulars, that where a creditor secured by a deed of trust is proceeding, with the co-operation of the trustee, to enforce his claim by a sale of the property *in pais*, the court will enjoin the sale and order a proper account to be taken, where it is made to appear by the debtor-plaintiff's bill that the title to the trust subject is clouded, or the *res* is uncertain, or the amount of the debt is in dispute, or that there are other con-

²². *Coles v. McRae*, 6 Rand. 718; *Simmons v. Lyles*, 27 Gratt. 922; *Kendrick v. Whitney*, 28 Gratt. 646; *Shultz v. Hansbrough*, 33 Gratt. 567; *Bristol, etc., Co. v. Caldwell*, 95 Va. 47; *Sims v. Tyrer*, 96 Va. 14.

The rule is generally not applicable to *personal property*—because of its perishable nature, and because personal chattels may usually be sold in detail, instead of in bulk. *Coles v. McRae*, *supra*; *Bank v. Trigg*, 106 Va. 327.

flicting liens on the property.²³ This means not only that the court will not itself decree a sale where these circumstances appear, but that it will *actively intervene and forbid a sale in pais*, until these uncertainties are cleared up.

§ 371. **The same.**—Where the reason of the rule ceases the rule itself ceases. Hence on a creditors' bill brought solely on behalf of the plaintiff or plaintiffs, whose claims are certain, or may be made certain by proofs in the cause, with like certainty or possible certainty as to the *res*, with nothing on the record to indicate the existence of other conflicting liens, the court will not assume the probability or possibility of other liens, and hence may order a sale without an account of liens.²⁴ And so, where it is evident that the non-enforcement of the rule would not produce the harmful results against which it is directed.²⁵

§ 372. **Attachment, injunction and receivership.**—These ancillary processes of attachment, injunction and receivership are nowhere more commonly found, nor more beneficially administered, than in combination with creditors' suits. To each of these a special chapter has been devoted in these notes.²⁶

23. *Gay v. Hancock*, 1 Rand. 72; *Miller v. Argyle*, 5 Leigh 460; *Wilkins v. Gordon*, 11 Leigh 547; *Hudson v. Barham*. 101 Va. 63.

24. *Repass v. Moore*, 96 Va. 147; *Shickel v. Berryville Land Co.*, 99 Va. 88.

25. *Bank v. Trigg*, 106 Va. 327—where it appeared that the first lien amounted to several millions of dollars, largely in excess of the value of the property, and that the inferior liens were for such comparatively small amounts as to exclude the probability that the inferior lienors would desire to bid at the sale.

26. See *ante*, Chs. xxv, xxvii, *post*, Chs. xxxii-xxxiii.

CHAPTER XXXII.

RECEIVERS.*

§ 372a. **Receiver—nature of the office.**—A receiver is a disinterested executive officer appointed by a court of equity,¹ whose duty it is, under the direction and supervision of the court, to take possession of property, real or personal, involved in an equity suit, for the purpose of preserving it *pendente lite*, where for good reason it seems to the court that no party to the suit should have the custody of it.²

1. APPOINTMENT OF RECEIVER.

§ 373. **The same—purpose of his appointment.**—While the main purpose of a receivership, as indicated, is to preserve the *res* during the litigation, and finally to dispose of it as the court may direct, the office is not necessarily a passive one and the receiver a mere custodian. Not infrequently the preservation of the property, because of its inherent nature, requires that it be actively used or operated, in which case the scope of the receivership becomes much wider than that of mere custody of the property.

Thus, where the *res* is constituted of the assets of a railway company, or other public utility, which, in the interest of the public as well as of its owners and creditors, must be operated—or where, though not of public concern, the value of the property would be seriously affected by ceasing the operations connected with it (as in the case of the plant of a newspaper, or of

*Consult: High on Receivers (4th ed.).

1. *Statutory receivers*—that is, those designated directly by statute, or appointed by executive officials or boards, under authority of statute—are not within the scope of our discussion. See Relfe v. Rundle, 103 U. S. 222; *post*, § 409, *et seq.*

2. The nature of the office, and the purpose and effect of the appointment of a receiver, are lucidly explained by Baldwin, J., in *Beverly v. Brooks*, 4 Gratt. 187, 208.

a manufacturing property with large unfinished material on hand, and profitable unfilled contracts)—the receiver may be directed to operate the *res* as a *going concern*, so as to preserve the good-will, and otherwise prevent serious loss to the owners and other parties in interest.

§ 374. Circumstances justifying appointment of receiver.—In order to call into exercise the extraordinary jurisdiction to seize the defendant's property, and to take it out of his possession before the plaintiff has established his right thereto, or the validity of his claim against it, by a trial on the merits, the court must be satisfied that there are good reasons why the property should be taken into its custody by the appointment of a receiver.

There are two chief circumstances upon which the bill for a receiver must rest, namely, (1) The plaintiff must have *an equity in the res itself*, and not a merely personal claim against the defendant owner; and (2) It must appear to the satisfaction of the court that the *rights of the plaintiff will be jeopardized if the property be left in the defendant's possession*—as by removal beyond the jurisdiction, misuse, misapplication, spoliation, wastage, or otherwise.

§ 375. The same.—"The exercise of the extraordinary power of a chancellor in appointing receivers," says Mr. High,³ "as in granting writs of injunction or *ne exeat*, is an exceedingly delicate and responsible duty, to be discharged by the court with utmost caution, and only under such special or peculiar circumstances as demand summary relief. Indeed the appointment of a receiver is regarded as one of the most difficult and embarrassing duties which a court of equity is called upon to perform. It is a peremptory measure whose effect, temporarily at least, is to deprive of his property a defendant in possession, before a final judgment or decree is reached by the court determining the rights of the parties. It is therefore not to be exercised doubtfully, but the court must be convinced that the relief is needful, and that it is the appropriate means of securing an ap-

3. High, Receivers 3.

propriate end. And since it is a serious interference with the rights of the citizen, without the verdict of a jury, and before a regular hearing, it should be granted only for the prevention of manifest wrong and injury."

§ 376. The same—special circumstances to be shown.

—It is important for the student to observe that in view of the harshness of the proceeding as described in the sections preceding, in order to justify the appointment of a receiver the plaintiff must disclose such a claim in his bill as clearly gives him standing in a court of equity to assert it, as well as the peculiar circumstances that render a receivership essential to protect the right asserted. It must be remembered that the appointment of the receiver is *not the primary object of the suit*, but is merely *ancillary* to some equitable right which it is the chief purpose of the bill to protect and enforce. It is vital therefore that the application for the receivership be based on a valid equity sought to be enforced, for the conservation and security of which, the appointment of the receiver is necessary.

Hence, in order to exhibit a case proper for the appointment of a receiver, the plaintiff's bill must (1) assert *a valid equitable claim or right* (that is, one not remediable at law) *to, or charged upon, the very property sought to be made the subject of the receivership*; and (2) must allege the *special circumstances which make the appointment of a receiver essential for the preservation of the property*, and its forthcoming at the proper time, in response to the decree of the court, on the final determination of the controversy.⁴

§ 377. The same continued—(1) nature of the plaintiff's right.—The plaintiff's right must rest on an equitable claim, or one for the assertion of which there is no adequate legal remedy; and must be in the nature of an *equity in the property*, (i. e. *in rem*) so that the defendant's relation to the *res* is in the nature of a trust for the plaintiff's benefit. Unless the right be *in rem* in its original form, it must be converted into

4. See High, Receivers, 11-12.

such a right by judgment or otherwise, before the plaintiff has a *locus standi* for the appointment of a receiver—on the kindred and familiar principle that a general creditor cannot maintain a creditors' bill or interfere with the defendant's possession of his own estate.⁵ Thus a creditor in position to maintain a creditors' bill,⁶ a plaintiff asserting a trust in the *res*, express or implied, for his benefit,⁷ minority shareholders of a corporation seeking an accounting or a winding up of the corporate affairs,⁸ partners seeking a dissolution and winding up of the firm business, or an accounting and winding up after dissolution,⁹ are illustrations of proper plaintiffs in an application for a receiver.

§ 378. The same—(2) necessity of receiver for preservation of the *res*.—Assuming that the bill contains proper allegations as to the plaintiff's right to equitable relief, the second essential of his case for a receiver is that there be a well grounded apprehension of immediate danger of serious loss to the plaintiff, unless the property be placed in the custody of a receiver.¹⁰

§ 379. The same—special appointment.—While in many states courts of equity are served by a permanent official known as a *General Receiver*, the duties of such an official are usually no other than those of the financial agent of the court, to receive funds paid into court and to preserve, invest, or otherwise dispose of them as the court may order.¹¹

The receiver to whom this brief discussion is confined is a temporary officer, usually named by special designation of the court in the cause in which he acts as receiver.

5. High, Receivers, 9-11.

6. For the essentials of which see *Creditors' Bills*, ante, § 350 *et seq.* High, Receivers, 399-471.

7. High, Receivers, 9, 412, 694-699.

8. After exhausting all means of redress within the corporation itself. *Hawes v. Oakland*, 104 U. S. 450; *Passenger & Power Co. v. Fished*, 104 Va. 121; *Marshall on Corporations*, § 304; *Equity Rule 27*; High, Receivers, 292 *et seq.*

9. High, Receivers, 472-552.

10. High, Receivers, 11.

11. Va. Code §§ 3405 *et seq.*

§ 380. The same—appointment continued—in vacation.

—The analogy between the preliminary injunction and the appointment of a receiver is both close and striking,—an analogy to which we shall have occasion to recur again. Both are in their nature extraordinary and preventive proceedings—neither affects the merits of the controversy,—the purpose of both is to preserve the *status quo*—and the one is frequently the complement of the other. In many cases the appointment of a receiver without the further protection of an injunction, or the granting of the injunction without the precautionary measure of a receivership, would be fruitless. It necessarily follows therefore that jurisdiction to grant injunctions draws with it, *ex necessitate*, jurisdiction to appoint a receiver. Hence the question whether a particular court or judge has jurisdiction to appoint a receiver, and whether the appointment may be made in vacation (where there is no determining statutory provision) will depend on the jurisdiction of the court or judge with respect to the granting of injunctions. Power to grant the latter includes the necessary incident of appointing the former.¹² And the power to appoint in vacation carries with it the power to discharge in vacation.¹³

2. NOTICE OF APPLICATION.**§ 381. Appointment continued—notice of application.**

—While there is a strong analogy between the issuing of a preliminary injunction and the appointment of a receiver as already pointed out, the latter is yet a much more serious and far-reaching disturbance of the apparent rights of the defendant. The injunction is merely negative and does not alter the *status quo*, whereas the receivership—is, in a sense, an anticipatory execution, (or, perhaps, more accurately, an equitable attachment), and deprives the defendant of the possession of his property

12. High, Receivers, 15-16; 105-106; *Smith v. Butcher*, 28 Gratt. 144; *Harwell v. Potts*, 80 Ala. 70; *Rainey v. Freeport, etc., Co.*, 58 W. Va. 424. See *Injunctions*, ante, Ch. xxvii.

13. *Crawford v. Ross*, 39 Ga. 44; High, Receivers 824-826; ante, § 296.

at the very beginning of the suit, before the plaintiff has established his claim by a trial on the merits, and before the defendant has had opportunity of making his defense.

It is natural, therefore, that courts should be more averse to the appointment of a receiver than to the granting of a preliminary injunction, and should proceed with greater caution in the one case than the other.

It is an imperative rule, therefore, (with the exceptions presently to be noted) that no application for the appointment of a receiver will be granted on a mere *ex parte* application, but that the defendant must have seasonable notice of the application, with opportunity to introduce counter-affidavits to meet those offered by the plaintiff in support of the allegations of his bill.¹⁴

§ 382. Notice of application—continued.—But this rule, while imperative is not inflexible, nor carried further than justified by the reason on which it rests. Hence the court will not insist upon notice to the defendant where it is impracticable—as where the defendant has absconded; or where he is beyond the jurisdiction and is not represented by counsel or other authorized representative, and the situation is urgent. Nor will notice be required where it is clearly shown that notice to the defendant would probably *defeat the very object sought* in the application for the receivership—as that the defendant, in con-

14. High, Receivers, 112 *et seq.*; Freidenheim *v.* Rohr, 87 Va. 764; Ruffner *v.* Mairs, 32 W. Va. 655, 11 S. E. 5; Stockton *v.* Harmon, 32 Fla. 312, 13 So. 833; Ensley Devel. Co. *v.* Powell, 147 Ala. 300, 40 So. 137; Rogers *v.* Dougherty, 20 Ga. 271. In Bristow *v.* Home Building Co., 91 Va. 18, 20 S. E. 946, it was held that where, on the subsequent appearance of the defendant, the court overruled his motion to discharge the receiver, and sustained its original order, this is equivalent to holding that after notice and argument, the *ex parte* application for an injunction and receiver ought to have been granted.

The appointment of a receiver, without notice, cannot be a more summary proceeding than the familiar proceeding under *attachment* statutes, which require no notice to the defendant prior to the seizure of his property. So it would seem that if the bill makes out such an equitable case as would justify an attachment at law if the claim were legal, it will ordinarily have stated a proper case for the appointment of a receiver.

sequence of the notice, would probably remove the *res* from the jurisdiction, or otherwise attempt to defeat justice.

In other words, the rule of notice gives way where to enforce it would threaten greater injustice to the plaintiff than its non-enforcement to the defendant.¹⁵

3. RECEIVER'S BOND.

§ 383. Receiver's bond.—Unless dispensed with by consent of parties, or, in rare cases, where plainly unnecessary, the receiver, before he is competent to perform any official duty, is required to execute a bond, with sufficient sureties, conditioned for the faithful performance of his duties, including a due accounting for all funds or property coming into his hands officially. The order appointing him usually provides that he shall have no powers thereunder until he has executed the required bond, in the penalty prescribed in the order.

§ 384. The same—retroactive effect.—Where there is an interval between the appointment and the qualification of the receiver, the better rule is that the qualification operates retrospectively, and the rights and title of the receiver will be reckoned as of the date of his appointment. Hence the receiver's title will take precedence over a levy made in the interval between his appointment and his qualification.¹⁶

4. EFFECT OF RECEIVER'S APPOINTMENT.

§ 385. Effect of appointment.—The appointment of a receiver is in no wise the determination of the merits of the controversy. Indeed, as already indicated, such appointment is

15. *High, Receivers*, 113-117 *Jacksonville, etc., Co. v. Stockton*, 40 Fla. 141, 23 So. 557; *Pollard v. Southern Fertilizer Co.*, 122 Ala. 409, 25 So. 169; *Verplanck v. Mercantile Ins. Co.*, 2 Paige 438 (per Walworth, Chancellor).

16. *High, Receivers*, 121a; *In re Christian Jensen Co.*, 128 N. Y. 550, 28 N. E. 665; *Temple v. Glasgow*, 25 C. C. A. 540, 80 Fed. 441, distinguishing *Frayser v. Railway Co.*, 81 Va. 388. Compare *Woods v. Ellis*, 85 Va. 471, where the contrary was assumed without discussion.

strikingly analogous to the *preliminary injunction* or to *attachments*—to either of which proceedings the receivership is not infrequently ancillary. The purpose of the preliminary injunction is to preserve the *status quo*; the purpose of the *attachment*, to hold, preserve and to secure the forthcoming of the property attached; and so the object of the *receivership* is simply to safeguard the *status quo* the more securely, by removing the subject-matter of the controversy beyond the reach of any of the litigants, and placing it in the custody of the court, so that it may be forthcoming to meet such decree or decrees as may be made in the premises.¹⁷

§ 386. Effect of appointment, continued—the receiver's title.—It follows from what has been said, that the appointment of the receiver operates only as a temporary sequestration, and has no effect on the title to the property or the merits of the controversy; but the title, legal and equitable, remains undisturbed by the appointment—the right of possession alone being affected. The title of the receiver, therefore, is in no sense that of the *trustee* of an express trust, or of an *assignee*.

From this, it further follows, as we shall see later, that actions at law brought by the receiver under the direction of the court must generally be asserted in the name of the legal owner, and cannot be maintained in the name of the receiver.¹⁸

§ 387. The same—property is in custodia legis.—The possession of the receiver is the possession of the court, of which the receiver is but the arm—and hence the effect of the receivership is to place the estate *in custodia legis*, for the benefit of such of the litigants as may be declared entitled to it or its proceeds on the final determination of the controversy.

17. *Beverley v. Brooke*, 4 Gratt. 187, 208.

18. Save, of course, where the receiver can *show title*—as by assignment, or by statute, or where he has possessory title. See *post*, *Suit by Receivers*, §§ 400, *et seq.* This, on the familiar principle that equity acts *in personam* only, and hence its decrees cannot *ex proprio vigore* transfer legal title. See *ante*, § 275, n. 8. In some of the states, the practice is to compel the holder of the title to convey it to the receiver. *Fletcher*, Eq. Pl. & Pr. 491; *High*, *Receivers*, 443-449.

§ 388. **Interference with receiver's possession.**—The important consequence of the taking of the *res* into the custody of the court, through the instrumentality of the receiver, is, that any interference with the receiver's possession, without consent of the court, *will be treated as a contempt of court* and punished accordingly.¹⁹ The court may also vindicate its authority by injunction.²⁰

Not only is it such contempt for a private person thus to interfere with the receiver's possession, but it is equally so where such interference is in the form of *legal proceedings against the property*. Thus an officer who levies an execution or a distress warrant on property in the possession of a receiver, without consent of the court, is guilty of contempt.²¹

5. FAMILIAR INSTANCES OF RECEIVERSHIPS.

§ 389. **Familiar instances of receiverships.**—It is, of course, impossible to enumerate, in the form of concrete statement, the various circumstances justifying a receivership, but perhaps a few illustrations of the more common cases in which receivers are appointed—almost as a matter of course—may be helpful to the student:

(a) *Foreclosure of mortgages* and other liens on *real* property, where it is doubtful whether the proceeds of the mortgaged property will be sufficient to satisfy the debt, and, because of the insolvency of the debtor, the mortgagee desires to sequester the rents and profits. Here a receiver may be named to collect the rents and profits.²²

(b) *Foreclosure of mortgages* or other liens on *personal or mixed* property, where good cause is shown for placing the property in the custody of a receiver. Under this head would come

19. High, Receivers 163, *et seq.*

20. Id. 256.

21. Id. 163, *et seq.*

22. High, Receivers 639-691; Smith v. Butcher, 28 Gratt. 144; Freedman's Sav. Bank v. Shepperd, 127 U. S. 494; Shepperd v. Pepper, 133 U. S. 626.

the foreclosure of mortgages on railways and other public service companies—or on the property of private corporations or of individuals, where the mortgaged assets are of such a character that they are liable to spoliation or wastage.²³

(c) In cases of *creditors' bills* generally—where the assets are of a character to need the special protection afforded by a receivership.²⁴ The receivership is particularly appropriate in creditors' suits to subject personal assets transferred in fraud of creditors.²⁵

(d) *Shareholders' suits*²⁶ to wind up the affairs of the corporation, for insolvency or other proper cause; as well as suits by minority shareholders against directors or other officials to recover corporate funds wrongfully appropriated or negligently lost.

(e) *Controversies between partners*, calling for a dissolution and winding up of the partnership affairs, where the partners cannot agree upon the terms of the dissolution, or on the custody, control and disposition of the assets after dissolution.²⁷

(f) *Controversies between trustee and cestui que trust*, where the latter seeks a removal of the trustee for fraud, incompetency, or other cause indicating the propriety of placing the trust *res* in the custody of a receiver.²⁸

23. High, Receivers 376-389a, 647.

24. High, Receivers 399, *et seq.* The student will of course recall that in the absence of statute, *general* creditors cannot maintain such a bill. See *Creditors' Bills*, *ante*, Ch. xxxi.

25. By special statute in Virginia general creditors may have relief in equity here. Va. Code, § 2460; *ante*, § 354.

26. High, Receivers 292-295c.

27. High, Receivers 472-508.

28. *Id.* 697, *et seq.*

CHAPTER XXXIII.

RECEIVERS—CONTINUED.

6. GENERAL POWERS OF RECEIVER.

§ 390. **General powers and duties of receiver.**—As more than once heretofore indicated, the receiver is the mere arm of the court, and hence his powers and duties are necessarily dependent on the terms of the decree appointing him, and of such subsequent orders as the court may, from time to time, enter, enlarging, restricting or otherwise modifying the original order of appointment.

§ 391. **The same—implied powers—duties passive.**—Where his duties are merely passive, the implied powers of the receiver are somewhat similar to those of a special agent—and will not be extended by implication beyond those powers clearly incidental to the powers expressly conferred. But the order of appointment will be construed as conferring all powers reasonably incidental to the main powers.¹

§ 392. **Implied powers—continued—duties active.**—Where the duties of the receiver are not simply passive, but are active in their nature—as where they include the general management and operation of the *res* as a going concern—(*e. g.* a railway or other public utility, or a manufacturing plant or the publication of a newspaper) since, in the nature of the case, minute instructions are impracticable, the receiver must of necessity be invested with wide discretionary power, by implication. And in the conduct and management of such operations, where not otherwise restricted by the directions of the court, the receiver may exercise such incidental powers as, under the circumstances, necessarily or reasonably accompany the conduct of the business intrusted to him.²

1. See *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287; authorities in next footnote.

2. *State Bank of Virginia v. Domestic Sewing Machine Co.*, 99 Va. 411; *High, Receivers* 36, 175-180, 313-342, 390-394.

7. SUITS AGAINST RECEIVERS.

§ 393. **Suits against receivers.**—For the reasons already mentioned, the institution of a suit against the receiver, in his official capacity, without consent of the court, is likewise a contempt—punishable in contempt proceedings, and remediable by injunction.³ Many authorities go further, and hold that the question of consent is a jurisdictional one, and the absence of such consent is fatal to the jurisdiction.⁴

§ 394. **The same—how rights against receiver asserted—intervention.**—Creditors and others asserting against the *res* in the receiver's hands—claims arising *anterior* to the receivership, or not out of any act of or transaction of the receiver or his agents—must, of course, *intervene in the equity suit* in which the *res* is being administered, unless such claims are asserted in the original bill. These claims are not against the receiver but against the *res* only. Such intervention may be either by a formal petition, or by proof under an order of reference. As stated, such claims are liabilities of the *defendant* whose estate has been sequestered by means of receivership.

But where claims arise *against the receiver as such* (of course, subsequent to his appointment), out of his management or operations connected with the sequestered property,—claims which the receiver refuses to pay, or to audit for payment—the proper method of proceeding is to file (by consent of the court) a petition in the pending chancery suit, showing a valid *prima facie* claim against the receiver, and praying for permission to prosecute the claim either by proceedings in the cause itself, or in an independent suit against the receiver, in such forum as the

3. High, Receivers 254.

4. Though the weight of authority is *contra*. *Id.* 254a. See *Melendy v. Barbour*, 78 Va. 544; *Reed v. Axtell*, 84 Va. 231; *Barton v. Barbour*, 104 U. S. 126. Where, however, the suit is against the receiver *personally*, as for a trespass committed under color of his receivership, but outside and in excess of his authority, the rule probably does not apply—since here the plaintiff is not seeking in any manner to assert a claim against the property *in custodia legis*. High, Receivers 257.

court may designate, at law or in equity, according to the nature of the demand.⁵

§ 395. Judgment against receiver—nature—how enforced.—Where the claim is thus against the receiver officially, and not for personal wrongs which he may have committed beyond the scope of his official duties,⁶ a valid judgment recovered against him does not bind the receiver *personally*—since in substance the proceeding is *against the receivership*, or the fund represented by it.⁷

The proper procedure after judgment, is to petition the court administering the assets to allow and order the judgment paid out of the receivership funds, according to the priority to which it may be entitled. As previously pointed out, execution on such judgment cannot be levied on the assets in the hands of the receiver. To permit claimants thus to levy executions would seriously disarrange the priorities of the various claims, and would render the orderly administration of the assets impossible. Hence such a levy would be punishable as a contempt of the court.⁸

§ 396. Statutory license to sue receivers.—The manifest inconvenience of intervening in a chancery suit, pending per-

5. High, Receiver 254, 254a-255.

6. High, Receivers 269, *et seq.*

7. High, Receivers 255, 395, *et seq.*; McNulta v. Lockridge, 141 U. S. 327; Bartlett v. Cicero Light Co., 177 Ill. 68, 52 N. E. 339, 68 L. R. A. 78, 69 Am. St. Rep. 206. As to the conclusiveness of such judgment upon the interests represented by the receiver, see Painter v. Painter, 138 Cal. 231, 71 Pac. 90, 94 Am. St. Rep. 47, note. Doubtless, where the judgment is in a *court of law*, (which ignores equitable titles and proceedings, and even the *existence* of a court of equity, although the presiding judge be the same in both courts), the designation of the defendant as "receiver" would be treated by the law court simply as *descriptio personae*, and the judgment would be, in form and effect against the receiver *personally*. But as the plaintiff in the judgment is a *quasi-party* to the suit in the equity court that appointed the receiver (by reason of his intervention for license to sue), that court will control the judgment at law, and treat it as affecting the *res only*.

8. High, Receivers 141, 163; *supra*, § 388.

haps at a point far removed from the locality in which the claim against the receiver arose, has resulted in statutes in many states, authorizing such suits to be brought *without previous leave of the court*.

§ 397. The same—scope of statutes.—These statutes vary in their scope, which, in some jurisdictions, as in Virginia,⁹ is confined to suits against *receivers of corporations*, while in others, as in the Federal jurisdiction,¹⁰ it embraces receivers of both corporate and individual property.

Naturally these statutes do not throw the door wide open to litigants to contest with the receiver, in such independent actions, their claims against the insolvent defendant, owner of the *res* in the receiver's hands—claims properly justifiable only in the pending suit in which the receiver was appointed; but the license to sue the receiver without consent of the appointing court extends only to suits "in respect of *any act or transaction of his* in carrying on the business connected with such corporation."¹¹

§ 398. The same—how judgment enforced.—To permit the successful plaintiff in such licensed action against the receiver to issue execution on his judgment, and levy on the *res* in the hands of the receiver, or otherwise to proceed to enforce his judgment out of the assets in the hands of the receiver, against which assets prior claimants have already proceeded by the very circumstance of the existing receivership, would seriously disarrange the priorities of the various claimants, and hamper the orderly administration of the assets in the hands of the court.

Hence, either by express provision of the statute,¹² or by

9. Va. Code, § 3415a.

10. Judicial Code (Suppl. 1911), § 66.

11. Va. Code, § 3415a; Fed. Judicial Code (Suppl. 1911), § 66. The language quoted is identical in both statutes, except that the Federal statute substitutes the final word "corporation" by the word "property." For a discussion of the cases construing the Act of Congress, see High, Receivers 395b.

12. As in Virginia, § 3415a.

judicial construction,¹³ the successful plaintiff is not permitted to levy on the *res* in the receiver's hands; but, after securing his judgment, must *intervene by petition* in the main suit; whereupon "the court shall direct the payment of such judgment in the same manner as if the claim upon which the judgment is based had been proved and allowed in said cause"¹⁴—that is, the court will give the judgment such relative priority as the claim upon which it is based would have been entitled to *had it been asserted and allowed in the main suit*. In other words, the judgment is enforced in the same manner as other judgments against receivers.¹⁵

§ 399. The same—the Federal statute.—The language of this statute is: "Every receiver or manager of any property, appointed by any court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without previous leave of the court in which such receiver or manager was appointed; but such suit shall be *subject to the general equity jurisdiction* of the court in which such receiver or manager was appointed, so far as the same may be necessary to the ends of justice."¹⁶

The proper construction of the final clause subjecting "such suit" to the "general equity jurisdiction" of the court appointing the receiver, does not authorize the court to reopen the judgment when offered in intervention proceedings by the judgment creditor, but merely to fix the time and mode of payment, and to adjust the competing rights of all claimants in the suit.¹⁷

The statutory license is broad enough to include, and does

13. As in the Federal jurisdiction. *St. Louis S. W. R. Co. v. Holbrook* (C. C. A. 1896), 73 Fed. 112; *Texas, etc., R. Co. v. Johnson*, 151 U. S. 81. See *High, Receivers*, 395b.

14. Va. Code, § 3415a(2). See the statute for further details. For methods of service of process on receivers, see *id.* § 3226.

15. See *Judgment against Receivers, ante*, § 395.

16. Judicial Code (Suppl. 1911), § 66.

17. *St. Louis S. W. R. Co. v. Holbrook* (C. C. A. 1896), 73 Fed. 112; *Texas, etc., R. Co. v. Johnson*, 151 U. S. 81.

include, the right to sue the receiver in any court of competent jurisdiction, *state or federal*.¹⁸

8. SUITS BY RECEIVERS.

§ 400. Suits by receivers—consent of court.—In absence of statute conferring other powers, the receiver, being a mere officer of the court, may exercise no other powers than those conferred. It follows that merely by virtue of his office he has no authority to institute suits on behalf of the interests which he represents. This rule is based on the logical and salutary principle that it is the province of the court itself (*i. e.* of the principal or appointing power) to determine whether it shall, through the receiver, become a litigant in a suit, at the risk of useless litigation and a waste of the funds which it is administering, rather than that the question should be left to the uncontrolled discretion of its agent or appointee.

Where, therefore, the receiver sues, as such, he must allege and prove his authority to do so from the court appointing him.¹⁹

§ 401. The same—name in which suit is brought—(1) transactions prior to receivership.—Where the receiver sues to assert a right connected with his receivership, but which arose before his appointment—a right therefore, vested in the insolvent, title to which is not divested by the receivership,²⁰—on principle, and according to the better authority, he must assert

18. *McNulta v. Lochridge*, 141 U. S. 327; *Texas, etc., R. Co. v. Johnson*, *supra*.

19. *High*, *Receivers* 200-203. As to the necessary allegations in such case, see *Taylor v. Canaday*, 155 Ind. 671, 57 N. E. 524, 59 N. E. 20; *Coddington v. Canaday*, 157 Ind. 243, 61 N. E. 567; *High*, *Receivers* 201. Mere authority to "collect" debts due the insolvent, does not confer authority to *collect by suit*. *McAllister v. Harman*, 97 Va. 547; *Screven v. Clark*, 48 Ga. 41.

Where the debtor of the insolvent or of the receiver is already properly a party to the suit, the claim of the receiver against him may be tried in the main suit, even though the claim be otherwise triable only at law. *N. Y. Life Ins. Co. v. Davis*, 94 Va. 427.

20. See *supra*, § 386.

the claim in *the name of the person to whom the right originally accrued*, and not in his own name.²¹

§ 402. Suits by receivers, continued—where receiver is assignee, or otherwise has title.—Where the receiver's claim of title does not rest on the mere order of the court, but is derived through an *assignment* by the insolvent, or under a *statute* expressly or impliedly investing him with title,²² since the reason for the rule denying him the right to sue in his own name no longer exists, the rule itself gives way.

In such case, having title, he may sue in his own name, and (in a court of law) without designating himself as receiver; since in a law court such designation is merely *descriptio personæ*.²³

§ 403. Suits by receivers, continued—(2) transactions subsequent to receivership.—On a cause of action arising subsequent to the appointment of a receiver, *out of a transaction had with the receiver or his agents*, there is, on principle, no

21. This rule would seem of special force in courts of law, and in those jurisdictions (as in Virginia) where *legal title* alone is recognized in such courts. See *Battle v. Davis*, 66 N. C. 252; *Freeman v. Winchester*, 18 Winchester, 18 Miss. 577; *Yeager v. Wallace*, 44 Pa. St. 294, where the rule is especially well stated by Strong, J.; *Homer v. Barr*, etc., Co., 180 Mass. 163, 61 N. E. 883, 91 Am. St. Rep. 269; *Murtey v. Allen*, 71 Vt. 377, 45 Atl. 752, 76 Am. St. Rep. 779. Some of these authorities refer to *foreign* receivers, but the principle seems equally applicable to domestic receivers, except as indicated in the following section. High, *Receivers*, 209-210—indicating some conflict in the authorities. The practice is settled in some states by statute, as in New York. *Id.* 211-212, 447; *Porter v. Williams*, 5 Seld. 142. As shown in Mr. High's valuable treatise, so often cited in these notes, some of the adverse authorities hold that by having *lawful possession* of the documents—as in the case of bills, notes or other *choses in action*—such possession gives the receiver a special title, so as to authorize suit in his own name. High, *Receivers ubi sup.* Nor, on principle, is the situation altered by the circumstance that express authority to sue in his own name is *conferred by the appointing court*. *Id.*

22. See *infra*, *Foreign Receivers*, § 405.

23. *Boyle v. Townes*, 9 Leigh 158; *Wray v. Jamison*, 10 Humph. (Tenn.) 186; High, *Receivers* 244.

difficulty in his maintaining a suit thereon *in his own name*, in any court of competent jurisdiction, foreign or domestic—since, as a party to the transaction, he has legal title to the claim. In such case he might maintain a suit without naming himself as receiver, as such designation is merely *descriptio personæ*, as noted in the preceding section.

Thus he may maintain *assumpsit* in his own name for the purchase price of goods sold by him as receiver;²⁴ in trover for a chattel bailed by the receiver to the defendant;²⁵ to recover (even in a foreign jurisdiction) property of which he has once obtained possession in his own state, since such possession gives him a special title as against a wrong-doer;²⁶ and, of course, on all contracts or transactions made or had with him in connection with the affairs of the receivership.

§ 404. Conflicting receiverships—priority of jurisdiction.—As between courts of co-ordinate jurisdiction in the same state, it is the settled rule that the court first moving in the process of administering the *res* by appointing a receiver, will have priority of jurisdiction over another court subsequently appointing a receiver of the same property—and this whether the first receiver has taken actual possession of the *res* or not.²⁷ And this rule applies equally where one of the competing receivers is appointed by a State court and the other by a Federal court.²⁸ The analogy between the effect of appointing a receiver as fixing priority of jurisdiction, and the effect of an order of reference in a creditors' suit,²⁹ seems complete.

9. CONFLICT OF LAWS—FOREIGN RECEIVERS.

§ 405. Conflict of laws—appointment of receiver over property in another jurisdiction.—Where the court has per-

24. *Singerly v. Fox*, 75 Pa. St. 112.

25. *Boyle v. Townes*, 9 Leigh 158.

26. *Cagill v. Woodbridge*, 8 Baxt. (Tenn.) 580, 35 Am. Rep. 716; note 15 Am. St. Rep. 82; *Kehr v. Hall*, 117 Ind. 405, 20 N. E. 279.

27. *High, Receivers* 48.

28. *Id.* 50-62a, 388. See *Foreign Receivers*, next section.

29. See *ante*, §§ 361 *et seq.*

sonal jurisdiction of the defendant, it has full power by its decree to compel him to deliver the *res* over to the custody of the receiver, in whatever jurisdiction it may be located. If the defendant be not personally served with process within the jurisdiction, or is not otherwise within the control of the court, the court can enter no personal decree—nor exercise jurisdiction over property of the defendant located in another state. Nor does jurisdiction over the person make the decree effective beyond the jurisdiction, as such decree operates *in personam* only—on the conscience of the defendant. But operating thus on his conscience, the defendant may be compelled by proper process to obey the order of the court directing that the possession of the foreign *res* be delivered to its receiver³⁰—or, as it seems, may compel an assignment thereof to the receiver, in trust for the interests represented in the suit.³¹

In case the property be held adversely in the foreign state, or legal proceedings be otherwise necessary in the foreign state to obtain possession, the right of the receiver to maintain suit in the foreign court will depend on circumstances to be considered in the following sections.

§ 406. Foreign receivers.—It not infrequently happens, particularly in connection with receivers of insolvent corporations, that there are assets, tangible or intangible, widely scattered throughout different states. In such cases, the question how far the powers and rights of the receiver appointed in the home state will be recognized in other jurisdictions, becomes an important one.

§ 407. The same—suits by foreign receivers.—It is settled that the full faith and credit clause of the Federal Constitution does not require the courts of one state to recognize the official character and authority of a receiver appointed in another state. The official status of the receiver, like that of a sheriff or

30. Receiverships of railways traversing several states, are familiar instances. *High, Receivers* 44, 388a; *Wilmer v. Railway Co.* 2 Woods 409. See *Ancillary Receivers*, *infra*, § 409.

31. See *infra*, §§ 407 (n. 31), 409.

of an administrator, does not accompany him beyond the territorial jurisdiction of the court appointing him. Being the mere arm of a court whose process can have no extraterritorial potency, his home-conferred status and powers are necessarily measured by that of the process of the appointing court.³² This rule applies where the receiver of one Federal court sues in another Federal court outside of the circuit;³³ and whether the receiver sues in his own name or that of the corporation;³⁴ and in spite of the circumstance that the suit is expressly directed by the court appointing him.³⁵

§ 408. Suits by foreign receivers, continued—relaxation of the rule by comity.—Notwithstanding the established rule denying to a receiver the privilege of maintaining a suit in a foreign jurisdiction *as a matter of right*, the courts are more and more evincing a disposition to accord recognition to foreign receivers from motives of *interstate comity*; and numerous instances of such comity are to be found in the reports.

This comity is usually extended on such terms as to preserve the rights of citizens of the state whose comity is thus invoked—and hence it will not be extended to the prejudice of citizens who have acquired rights against the *res* in the foreign jurisdiction, nor when it would contravene the laws or public policy of the state.³⁶

32. *Booth v. Clark*, 17 How. (U. S.) 322; *Hale v. Allinson*, 188 U. S. 56; *Great Western Mining, etc., Co. v. Harris*, 198 U. S. 561; monographic note 4 L. R. A. (N. S.) 824; 3 Va. Law Reg. 831; *High, Receivers* 239 *et seq.* The difficulty is frequently met by procuring an *assignment* (voluntarily, or under order of the court) to the receiver so as to vest title in him as trustee. See *infra*, § 409; *High, Receivers* 443 *et seq.*

33. *Brigham v. Luddington*, 12 Blatchf. 237; *High, Receivers* 239. See Federal Judicial Code, 56.

34. *Great Western Mining, etc., Co. v. Harris*, 198 U. S. 561; *High, Receivers* 239.

35. *Id.*

36. *High, Receivers* 239-241; *Folger v. Columbia Ins. Co.*, 99 Mass. 267, 96 Am. Dec. 747; note 6 Am. St. Rep. 185; *Holbrook v. Ford*, 153 Ill. 633, 46 Am. St. Rep. 917; *Straughan v. Hallwood*, 30 W. Va. 274, 8 Am. St. Rep. 49, and extensive note; *Grogan v. Egbert* (W. Va.), 28 S. E. 714; note 26 C. C. A. 49-58; *High, Receivers* 241.

10. ASSIGNEES AND STATUTORY RECEIVERS.

§ 409. **The same—rule inapplicable to assignees or statutory receivers.**—Of course a wholly different situation is presented where the receiver has *title* to the *res* which he is seeking to recover in the foreign jurisdiction. It is the lack of title that defeats his claim to recognition.³⁷

Hence if he hold an *assignment* from the real owner (who will usually be the main defendant in the original suit in which the receiver was appointed)—or is exercising powers under a valid *statute* of the state of his appointment, which in terms, or by implication, vests him with title and control of the *res*, where-soever situated,—then the question of his recognition by the courts of a foreign state is no longer one of *comity*, but he is entitled to demand recognition as a matter of *right*. In such a situation, the receiver is not the representative of a foreign court, but *pro hac vice* is the owner of the right or title that he is asserting, under the terms of an express trust.³⁸

Thus, if the statutes of the state under whose laws a corporation is organized provide that a particular official, whether called receiver, statutory assignee, commissioner, or by other designation, shall take charge of its affairs upon insolvency, such a provision is in effect a *part of its corporate charter*. A corporation may have one set of officers for the management of its affairs while engaged in active operations, and another to take charge of and wind up its affairs upon its insolvency. When such a corporation does business in a foreign state it carries with it not only those provisions of its charter that regulate its *active operations*, but those also that provide for its *dissolution*. The property and effects of such a corporation, therefore, vest in the official so designated by charter or general statute, to wind up its affairs, and he has the same powers and title in a foreign

37. See *Title of Receiver*, *supra*, § 386.

38. *Hawkins v. Glenn*, 131 U. S. 319; *Bernheimer v. Converse*, 206 U. S. 516; *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 891; *High, Receivers* 241a, 244. In such case, the description of himself as "receiver" would be immaterial, as merely *descriptio personæ*. *High, Receivers* 244; *supra*, § 403.

state as in the state of his appointment. And in such case, the assets must be distributed in accordance with the constitution of the corporation, without distinction between domestic and foreign creditors.³⁹

The same result follows where the receiver sues to recover property taken from his possession, since he has a possessory title.⁴⁰

11. ANCILLARY RECEIVERS.

§ 410. **Ancillary receivers.**—In order to avoid the difficulties that hamper the receiver when he attempts to assert dominion over assets in a foreign jurisdiction, it is common practice for the original plaintiffs, or some of them, to institute an equity suit in the foreign state, and to secure the appointment there of an *ancillary receiver*, with authority to take possession of all the assets of the insolvent within that jurisdiction.

Whether the domiciliary receiver may himself institute such suit for an ancillary receivership will depend on the question, already discussed,⁴¹ whether he is an assignee or otherwise has title to the assets which he is seeking to recover, or on the comity of the foreign court.⁴²

The court in the ancillary proceeding will give such a direction to the assets within the foreign jurisdiction as the nature of the situation may demand, looking eventually to their trans-

39. *Relfe v. Rundle*, 103 U. S. 222; *Bockover v. Life Association*, 77 Va. 85, 6 Am. & Eng. Corp. Cas. 603; *Martyne v. American, etc., Insurance Co.*, 215 N. Y. 000. See authorities in preceding note.

40. *Supra*, § 403.

41. *Supra*, § 409.

42. *High, Receivers* 306a-306b, 375a; *Mahon v. Ongley Electric Co.*, 159 N. Y. 196, 50 N. E. 805. The erection of ancillary receiverships, or what is tantamount thereto, is quite common in the foreclosure of mortgages on railroads whose lines run through several states, by proceedings in the Federal courts. By comity, the same receiver is appointed in each court, and the court first appointing the receiver is permitted to assume the general administration of the assets. *Central Trust Co. v. East Tenn., etc., R. Co.*, 30 Fed. 895; *Platt v. Philadelphia, etc., R. Co.*, 54 Fed. 569; *Clyde v. Richmond & D. R. Co.*, 56 Fed. 539; *High, Receivers* 375a.

mission to the domiciliary receiver in the home state—but usually taking care that the claims of local creditors who have secured liens on the estate prior to the ancillary receivership are first satisfied.⁴³

12. RECEIVERS' CERTIFICATES.

§ 411. **Receivers' Certificates.**—In the foreclosure of mortgages of railways, and doubtless of other public service companies, which, both from their nature and from public necessity, must, notwithstanding the receivership, be operated as going concerns, courts of equity possess the power, which is of not infrequent exercise when justified by the necessities of the case, to authorize the receiver *to borrow money on the credit of the entire corporate assets* under the control of the court, and to issue debentures or certificates of indebtedness therefor. Such certificates are known as "*receivers' certificates*." When issued *by consent* of the parties in interest, or, under proper circumstances, *without such consent, and after due notice to the bondholders*, or other lienors whose priorities are thus displaced, such certificates may be, and usually are, by order of the court, constituted *liens superior to all antecedent liens on the property*.

The theory upon which such action is justified is that the court having undertaken, through the receivership, the administration of the assets as a trust fund for the benefit of the creditors, and at their request, may rightfully preserve the assets at the expense of the fund; and since the operation of the railway is essential to protect the interests of the public, as well as to preserve the custom, good-will and corporate rights and franchises of the corporation, the expenses of such operation and management should properly be borne by the trust subject.⁴⁴ The rule does not apply to receiverships of *purely private corporations*, except where all lien-holders consent.⁴⁵

A few cases have extended the principle to receiverships of

43. High, Receivers 47, 306-306b.

44. Wallace v. Loomis, 97 U. S. 146; High, Receivers 398c, *et seq.*

45. High, Receivers 312b-312d; Fidelity Insurance. etc., Co. v. Roanoke Iron Co., 68 Fed. 623; Monographic note 26 C. C. A. 350-372.

purely private corporations, but the propriety of these decisions is doubtful.⁴⁶

Where, however, the preservation of the property makes it necessary, the propriety of issuing such certificates *not as a lien superior to existing liens*, or as a superior lien *by consent of all prior lienors*, is undoubted, even in the case of private corporations or (in principle) of individuals.⁴⁷

CHAPTER XXXIV.

APPEALS.¹

§ 412. The record in a chancery suit—bills of exception.—The difference in the practice at law and in chancery, is strikingly exemplified in the matter of the *record*. At law the record is a bare skeleton, containing merely the pleadings, empaneling of the jury, the verdict and the judgment—none of the numerous motions, exceptions to evidence, instructions given or refused, nor the evidence itself, being a part of the record, unless made so by a *bill of exceptions*.

On the other hand, in chancery every step taken in the cause, and every document filed therein, from the *subpœna* to the final decree, constitutes, or should constitute, a part of the record, without special order to that effect. Hence there is no such thing in chancery as a "*bill of exceptions*."²

46. *Id.* See *Karn & Hickson v. Rorer Iron Co.*, 86 Va. 754; *Prof. Burks*, 4 Va. Law Reg. 373. In *Osborne v. Big Stone Gap, etc., Co.*, 96 Va. 58, the Virginia court seems to approve of the application of the principle to *private corporations*, provided *due notice* is given to the creditors interested. But as no such notice was given, the approval was *obiter*.

47. See *Jerome v. McCarter*, 94 U. S. 734; *Kent v. Lake Superior Canal Co.*, 144 U. S. 75.

1. See Va. Code Chapters 169-170.

2. While this is true, there are still "*exceptions*" in equity—as to answer, to a master's or receiver's report, to testimony offered, etc. But these, when properly filed, become parts of the record as of

§ 413. The same—agreed statement in lieu of complete record.—Provision is made, both in Virginia ³ and in the Federal practice,⁴ for abbreviating the record for appeal by an *agreed statement of facts*. This privilege seems to have been quite generally ignored or overlooked by the Virginia bar.

§ 414. (a) Prerequisites of an appeal—subject-matter.—As a prerequisite to an appeal in any case in Virginia, there must be involved matter of sufficient importance to warrant a hearing of the case by the Court of Appeals. These prerequisites the statute ⁵ prescribes as follows:

- (1) Title or bounds of *lands*; or
- (2) A *freehold* or *franchise*; or
- (3) Some matter *not merely pecuniary* (e. g. custody of a child—divorce, etc.); or
- (4) An amount or value *equal to \$300*, exclusive of costs.

§ 415. (b) Character of the decree—stage of the cause.—If one of the foregoing prerequisites obtains, an appeal lies, *provided the case has progressed far enough*, and the action of the court is of sufficient moment, to warrant an appeal *at that stage of the cause*. This stage is fixed by the statute as follows: That is to say, an appeal lies (assuming the existence of a proper prerequisite, as above shown) from

- (a) Any *final* decree:
- (b) Any *interlocutory* decree, which
 - (1) Dissolves an injunction;
 - (2) Requires *money* to be paid;
 - (3) Requires *title* or *possession* of property to be changed; or
 - (4) Adjudicates the *principles of a cause*.

course. It has been heretofore pointed out that these exceptions should be specifically brought to the attention of the court and the *court's action thereon shown in the decree*, otherwise on appeal they will, as a general rule, be taken to have been waived.

3. Va. Code § 3460.

4. Equity Rule 77.

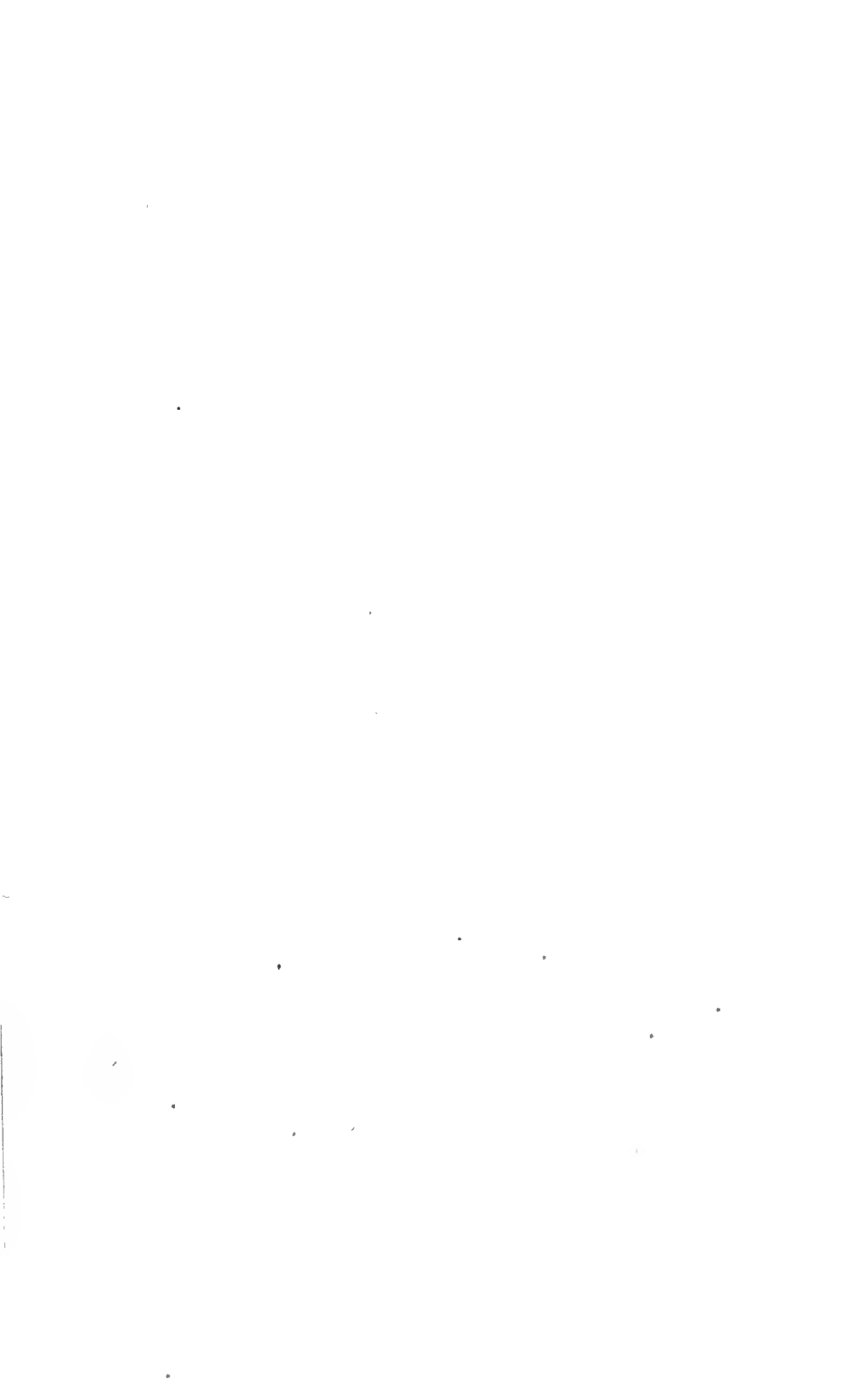
5. Va. Code §§ 3454-3455. See these sections for exceptional cases.

§ 416. (c) **Time limit to appeals.**—Appeals are limited to *one year after final decree*. Hence if the final decree has not been entered, there is *no time limit to an appeal from an interlocutory decree*.⁶

§ 417. **Time limit—exceptions.**—If, however, the appeal be from a decree refusing a *bill of review*⁷ to a decree rendered *more than six months prior thereto*, the appeal must be taken within *six months*. But for this provision, the one year limit to an appeal from a final decree might be extended practically to two years, by filing a bill of review just before expiration of the time limit for such a bill, and then appealing from the decree refusing the bill of review, within the usual time limit of twelve months.

6. See *ante*, § 159.

7. Which, as heretofore noted, may be filed at any time within one year from a final decree.



APPENDIX I.

In the following pages of this *Appendix* are presented the forms in a simple chancery suit, from the *subpœna* to the final decree. The suit is supposed to be one brought by the vendor for the specific performance of a contract for the sale of real property.

THE PROCEEDINGS IN A SUIT FOR SPECIFIC PERFORMANCE.

Kendrick v. Quinby.

THE MEMORANDUM OR PRÆCIPE.

To the clerk of the circuit court of Albemarle county:

John A. Kendrick

v.

Peter Quinby

Issue *subpœna* against the defendant, to the sheriff of Albemarle County. To first June rules.

May 17, 1915.

LEMON & HERBERT,
for complainant.

THE SUBPŒNA.

The Commonwealth of Virginia,

To the Sheriff of Albemarle County greeting:

We command you that you summon *Peter Quinby* to appear before the judge of our Circuit Court for the County of Albemarle, at the clerk's office of our said court, at rules to be holden therefor, on the *first Monday in June next*, to answer a *bill in chancery* exhibited against him in our said court by *John A. Kendrick*. And have then there this writ.

Witness William L. Maupin, the Clerk of our said county,

at the courthouse thereof, this the 18th day of May, in the year of our Lord 1915, and of our foundation the one hundred and thirty-ninth.

(signed) WILLIAM L. MAUPIN,
Clerk.

THE BILL: *By vendor, for specific performance.*

To the Honorable the Judge of the Circuit Court of Albemarle County:

The bill of your complainant, John A. Kendrick, of Albemarle county, Virginia, respectfully shows unto your honor:

1. That by a written contract bearing date on the first day of June, 1905, between your complainant and a certain Peter Quinby, of the same county, hereinafterwards named as defendant, your complainant agreed to sell to the said defendant, and the said defendant agreed to purchase from your complainant, a certain house and lot situated in the village of Keswick in said county, on the corner of Main Street and Maple Avenue, as the streets are designated on the plan of said village, which said lot is more fully described in the said written contract, a duplicate-original of which contract, signed by both parties, is herewith filed, marked "Exhibit 101," and asked to be read as a part of this bill.

2. By the terms of said contract, the defendant was required to pay, as the purchase price of said property, the sum of six thousand dollars, as follows, to-wit: Fifteen hundred dollars (\$1,500.) in cash, and the remainder, to-wit, four thousand and five hundred dollars (\$4,500.), in three (3) equal annual installments of fifteen hundred dollars (\$1,500.) each, represented by the three promissory notes of the defendant, bearing even date with said contract, and payable to your complainant in one, two and three years after date, respectively, with legal interest from date, until paid—all of which will more fully and at large appear by reference to said written contract hereinbefore referred to as Exhibit 101, and filed with this bill.

3. Your complainant further shows that in pursuance of the terms of said contract, the said defendant paid to your complainant the cash payment of fifteen hundred dollars (\$1,500.),

and executed and delivered to complainant the three promissory notes as aforesaid. The said defendant also took possession of the premises, as he was entitled to do under the said contract, and has been ever since, and is now, in, complete possession and enjoyment thereof.

4. Your complainant further shows that since the cash payment aforesaid, the said defendant has paid nothing whatsoever of the balance due under the terms of said contract, and by virtue of the promissory notes aforesaid, and in spite of complainant's numerous and urgent requests to do so. All of said notes are long since past due, with the interest accrued thereon. They are herewith filed, marked "Exhibits 102a," "102b" and "102c," respectively, and prayed to be read as parts of this bill.

5. Your complainant is advised that by virtue of the foregoing facts, he is entitled to come into a court of equity praying for a decree for the specific performance of the said contract by the said defendant; and, in case the said defendant shall fail or refuse to perform his promises when so required by the court's decree, that the court will treat the said contract as creating, by implication of equity, a lien on said premises, in favor of complainant, for the security of the unpaid purchase money aforesaid; and that the court in this proceeding will enforce the said lien by subjecting the said property to payment of the balance due as aforesaid.

6. Your complainant hereby avers his willingness and ability to make proper conveyance of the said premises to said defendant, with perfect legal title, as soon as the said purchase money has been paid to him. And complainant hereby offers to file such conveyance, duly executed, among the papers in this cause, whenever the court may so order.¹

1. In some jurisdictions it is held that complainant in a suit for specific performance must *file a deed of conveyance along with his bill*—though the better rule is *contra*. This clause, as here worded, would probably comply with the rule of practice even in those states holding the minority view. The latter view was maintained in *Wood v. Walker*, 92 Va. 24, but, as shown by Judge Burks in a criticism of

7. In consideration of the premises, and forasmuch as complainant is without remedy save in a court of equity where matters of this kind are only and properly cognizable, your complainant prays:

(a) That the said Peter Quinby be made a party defendant to this bill, and may answer the same, but not under oath.

(b) That a decree be entered against the said defendant requiring him, within such reasonable time as the court may order, to pay to your complainant the unpaid purchase money, with the interest thereon, as aforesaid; and in default of said payment, that the said premises may be sold under the orders and direction of the court, and that the proceeds, or so much thereof as may be necessary, be paid over to your complainant to satisfy the balance due him as aforesaid, together with the costs of this suit, including a fee of one hundred and fifty dollars (\$150.) to complainant's attorney herein.¹

(c) That all such other things be ordered and done as may be necessary for the complete disposition of this cause; and for such other relief, both general and special, as to equity may seem meet and the nature of the case may require.

And your complainant will ever pray, etc.

LEMON & HERBERT,
Charlottesville, Va.,
Solicitors for Complainant.

DEMURRER TO BILL.

Kendrick The demurrer of Peter Quinby to a bill of complainant exhibited against him in the Circuit court
v. of Albemarle county by John A. Kendrick.
Quinby.

This defendant says that the said bill is insufficient in law, and especially in this: (1) That the said com-

this ruling, in 1 Va. Law Reg. 442, it was probably erroneous. There is a distinct ruling to the contrary by Staples, J., in *Whitten v. Saunders*, 75 Va. 563, 570, nor does the minority view seem based on any sound reason.

1. See *post*, for defendant's demurrer to this prayer for an attorney's fee.

plainant has not tendered along with his bill a proper deed of conveyance of the said premises to this defendant; and (2) that the said bill seeks an allowance to complainant's counsel of an attorney's fee of one hundred and fifty dollars, without any special allegations rendering such an allowance, or any allowance, proper; for which second cause this defendant demurs to so much of said bill as prays for such inequitable allowance.

APPLEBY & PEARMON,

Solicitors for Defendant.

ORDER OF THE COURT: *Over-ruling demurrer to bill in part.*

Kendrick This cause came on this day to be heard on the
 v. bill of the plaintiff and the exhibits filed therewith,
 Quinby. and on the demurrer of the defendant to said
 bill, and was argued by counsel.

On consideration whereof, the court deeming as not well taken the first cause in said demurrer alleged, namely, that the plaintiff has not tendered a conveyance with his bill, doth over-rule the said demurrer as to said first cause alleged; and as to the second cause of said demurrer, namely, the insufficiency of said bill in failing to allege proper or any grounds for the allowance of the attorney's fee therein prayed, the court doth sustain the same. But leave is given to the plaintiff to amend his bill in that respect if he shall be so advised.

PLEA: *Statute of limitations.*

Kendrick The plea of Peter Quinby to a bill of com-
 v. plaint filed against him in the Circuit court of
 Quinby. Albemarle county, by John A. Kendrick.

For plea to the said bill, and to the whole and every part thereof, and to all and every the relief therein prayed, this defendant says that neither the complainant's alleged grounds of relief, nor any claim in said bill asserted, arose within five (5) years before the bringing of this suit.

Wherefore defendant prays judgment of this court whether he shall be compelled to make answer to said bill, and prays to

be hence dismissed with his reasonable costs and charges in this behalf expended.

APPLEBY & PEARMON,
Solicitors for Defendant.

ENTRY BY CLERK: *Plea set down for argument.*

Kendrick On motion of the plaintiff, by counsel, defend-
v. ant's plea is set down for argument.
Quinby.

ORDER OF THE COURT: *Plea disallowed.*

Kendrick This cause came on this day to be again heard
v. on the papers formerly read, and on the plea
Quinby. the defendant, set down for argument on the plain-
 tiff's motion, and was argued by counsel.

On consideration whereof, the court being of opinion that the statute of limitations set up in said plea is not applicable to the claims asserted in the plaintiff's bill, doth disallow the said plea. And the defendant is required to answer the bill within fifteen days from the date of this order.

DEFENDANT'S ANSWER.

The answer of Peter Quinby to a bill of complaint filed against him in the Circuit court of Albemarle county, by John A. Kendrick.

This respondent [reserving to himself the benefit of all just exceptions which may be had or taken to said bill by reason of its many errors and imperfections, both of form and substance]¹ for answer to said bill, or to so much thereof as he is advised it is material that he should answer, answering says:

1. That the allegations of the first and second clauses of the said bill, with respect to the contract of sale and purchase between respondent and complainant, of the premises therein referred to, are substantially true, and that the paper Exhibit

1. Old form—may be omitted.

"101" filed with the bill is a duplicate original of said contract; and that Exhibits 102a, 102b and 102c are the original promissory notes executed by respondent according to the terms of the said contract. It is also true that respondent has been in possession of the said premises since the execution of said contract and of said notes.

2. But it is not true that respondent has made no payment on the said deferred installments of purchase money. On the contrary respondent avers that he has, from time to time, made numerous payments on said notes, amounting in the aggregate to two thousand and seven hundred dollars (\$2,700), in addition to the cash payment of one thousand and five hundred dollars (\$1,500). Respondent files herewith, as a part of this answer, a more accurate and more detailed statement of such payments, with their respective amounts and dates—such statement being marked Exhibit "P. Q." Respondent also files as a part of this answer, receipts for each payment claimed, signed by Adam L. Henderson, attorney for complainant, which said attorney had due authority to receive such payments on behalf of the complainant and to give receipts therefor. These receipts are marked Exhibits "P. Q. 1", "P. Q. 2" and "P. Q. 3", respectively.

3. Respondent, further answering, says that having full confidence in the integrity of the complainant, respondent accepted without question the assurance of complainant that the complainant had complete and perfect title to said property, with right to convey the same by his sole deed when said purchase money was paid. But respondent has since ascertained, from reputable sources, and hence avers and charges, that at the time the said contract was made, the complainant was not an unmarried person as he fraudulently induced respondent to believe, but that he was then the husband of a living wife, to-wit, Sarah O. Kendrick (who was Sarah Owen), who is still living, and who was then, and is now, a person *non compos mentis*, and who is now, and has been for many years, confined in the State Hospital for the Insane at Staunton. And respondent is advised that the said wife of the complainant has a contingent right of dower in

the premises in controversy in this suit, and hence that should respondent be compelled to pay the balance of said purchase money, the complainant would be wholly unable to convey to respondent a complete title to said property. Respondent is therefore advised that not only will the court not compel him to accept an imperfect title to the said premises, but will, in a proper proceeding, rescind the said contract *ab initio*, and will require the complainant to repay to respondent the various sums heretofore paid by respondent to complainant as part payment for said premises as aforesaid, with interest from the respective dates of such payments.

Respondent is further advised that while such failure of title is a perfect defense to the bill of the complainant, it will be necessary in order to obtain the affirmative relief of rescission to which respondent is entitled, that he file a cross-bill in this suit, unless the court should see fit to treat respondent's answer as a cross-bill, which respondent now prays that the court will do.

And having fully answered, respondent prays to be hence dismissed with his reasonable costs in this behalf expended.

APPLEBY & PEARMON,

Solicitors for Respondent.

GENERAL REPLICATION TO ANSWER.¹

Kendrick For replication to said answer the plaintiff, by
v. counsel, says that the matters and things in said
Quinby, answer alleged as defenses to the plaintiff's bill
 are not true. But on the contrary, the plaintiff
asserts that the allegations of the said bill are true, as he will
maintain and establish by proper testimony.

LEMON & HERBERT,

for complainant.

1. Rarely written out at length, and usually appearing in the record only by clerk's entry on his docket "*Gen'l. Repl'n.*," or recited in the first decree as having been filed.

CROSS-BILL BY DEFENDANT: *Praying rescission of contract and return of payments made.*

To the Honorable the Judge of the Circuit Court of Albemarle county:

The cross-bill of your complainant, Peter Quinby, respectfully shows unto your honor:

1. That there is pending in your Honor's court a certain suit in chancery, under the short style of Kendrick *v.* Quinby, in which suit a certain John A. Kendrick is complainant, and your complainant herein is defendant.

2. That the purpose of the said suit is to compel the specific performance of a certain contract for the sale and purchase of certain real property, in which contract the said Kendrick was vendor and your complainant was vendee—all of which will more fully and at large appear, reference being had to the pleadings and exhibits in said original suit, which said pleadings and exhibits are prayed to be taken as parts of this cross-bill, as fully and effectually as if herein specifically recited.

3. Making specific reference to said contract, under which the said Kendrick, plaintiff in said original bill, and hereinafterwards prayed to be made a party defendant to this cross-bill, agreed, upon the payment of six thousand dollars (\$6,000.) of purchase money, payable as shown in said contract, to convey to your complainant a perfect title to the premises in the said bill and proceedings mentioned.

4. Your complainant further shows that believing that the defendant herein was an unmarried person (as he falsely pretended to be) and had complete title in himself to said premises, and could convey to your complainant a perfect title thereto by his sole deed, your complainant entered into said contract in good faith, and, in like faith, undertook to pay the purchase money according to the terms of the said contract.

5. Your complainant further shows that he made the cash payment called for by the terms of said contract, to-wit, one thousand and five hundred dollars (\$1,500.), on the day the said contract bears date, to-wit, June 1, 1905; and that subsequently he paid various large sums of money to the said Ken-

drick, through his duly authorized attorney, a certain Adam L. Henderson, as credits on complainant's notes held by said Kendrick and representing the deferred installments of purchase money due under said contract.

Your complainant has already filed with his answer in the said original suit, a detailed statement of all the payments so made by him under said contract—which statement is designated as Exhibit “P. Q.”, and now prayed to be read, along with the vouchers accompanying the same, as a part of this cross-bill as if copied herein at large. The aggregate amount of such payments, including the cash payment of fifteen hundred dollars (\$1,500.), is forty-two hundred dollars (\$4,200.), as shown in the exhibit last mentioned.

6. Your complainant further shows to the court that in spite of the said Kendrick's reiterated assertions to the contrary, fraudulently made to induce your complainant to enter into the said contract, the said Kendrick was not, at the time the said contract was made, an unmarried person, but on the contrary complainant avers and charges that he was at that time, and is now, the husband of one Sarah O. Kendrick (formerly Sarah Owen), who is still alive and a lunatic, and is now, and for many years previously has been, confined in the State Hospital for the Insane at Staunton.

Your complainant is advised that the said wife has a contingent right of dower in the property so contracted to be sold to your complainant, by reason whereof it will be impossible for the defendant herein to make to your complainant a complete title to said premises after the payment of said purchase money—and hence that not only will the court for that reason refuse the relief of specific performance prayed for in said original bill, but that on a cross-bill filed for the purpose, the court, if satisfied of the truth of the allegations hereinbefore made, will rescind the said contract *ab initio*, and will require the said defendant herein to repay to your complainant all moneys paid to said defendant under said contract, with interest from the date of such payments, respectively.

Being without other remedy, your complainant prays that he may be permitted to file this his cross-bill in said suit; that the

said John A. Kendrick, complainant in the original bill, be made a party defendant hereto, and may answer the same, but not under oath; that the contract in the bill and proceedings mentioned may, for the reasons herein before assigned, be declared null and void and of no effect; that the defendant herein be decreed to repay to your complainant the said sum of forty-two hundred dollars (\$4,200.), with interest from the respective dates of such payments; and for such other relief, both general and special, as to equity may seem meet and the nature of the case require. And your complainant will ever pray, etc.

APPLEBY & PEARMON,

Solicitors for Complainant in Cross-Bill.

PLAINTIFF'S DEMURRER TO CROSS-BILL.

Kendrick The demurrer of John A. Kendrick to a cross-
 v. bill filed against him in the circuit court of Al-
 Quinby. bamarle county, in a suit in chancery therein pend-
 ing under the short style of Kendrick v. Quinby:

This defendant in said cross-bill says that the said cross-bill is not sufficient in law, and especially in this, to-wit: (1) Because, assuming the existence of this defendant's alleged wife and her alleged insanity, there is no allegation that she is incurably insane, and hence, so far as concerns the allegations of said cross-bill, the said wife, if she in fact exists, may recover her sanity in time to unite with this defendant in making title to the complainant in the cross-bill;¹ (2) Because, in spite of the alleged insanity of the said wife, the court has full power in this suit to require this defendant to give proper indemnity to the complainant against any loss or damage to accrue by reason of such alleged contingent right of dower in said alleged wife of defendant, which indemnity respondent here offers to provide, in such form and for such amount as the court may prescribe.

Wherefore defendant demurs to said cross-bill, and to every part thereof, and to all and every the relief therein prayed for,

1. Counsel has overlooked Va. Code § 2565, making provision for releasing contingent dower right of insane wife.

and prays judgment whether he shall be required to answer the same.

LEMON & HERBERT,

For Defendant in Cross-Bill.

ORDER OF THE COURT: *Demurrer to cross-bill overruled.*

Kendrick This cause came on this day to be again heard
 v. on the papers formerly read, on the cross-bill of
 Quinby. the defendant, filed by leave of court, and on the
 plaintiff's demurrer to said cross-bill and was argued by counsel.

On consideration whereof, the court doth overrule the said demurrer. And the plaintiff is ordered to file his plea or answer to said cross-bill within fifteen days from the date of this order.

PLAINTIFF'S ANSWER TO CROSS-BILL.

The answer of John A. Kendrick to a cross-bill of complaint filed against him by a certain Peter Quinby, in a certain suit in chancery depending in the circuit court of Albemarle county, in which suit this respondent is plaintiff, and the complainant in said cross-bill is defendant.

For answer to said cross-bill, this respondent says:

1. That the allegations of said cross-bill with reference to the marriage of this respondent to a certain Sarah Owen, are wholly false and without any foundation whatsoever. On the contrary, respondent distinctly and unequivocally denies that he was ever married to the said Sarah Owen, or to any other person whomsoever; but he avers that at the time the contract which is the foundation of this controversy was made, he was an unmarried person, and has so continued to the present moment. Respondent is at a loss to understand why the complainant in the cross-bill should have set up a defense which he must have known was utterly unfounded, unless it should have been for the purpose of prolonging this litigation, and thus securing to himself a continued use of the said property of which he has so long enjoyed possession without complying with the terms of the contract under which he secured such possession.

2. Further answering, this respondent, with equal emphasis and directness, denies that the said complainant has at any time paid to him, in person or through his duly authorized agent or attorney, or through any other person, any such sums of money as complainant in his said cross-bill has so recklessly alleged, or other sums at any time, or in any manner, save the cash payments made at the time the said contract was entered into, as shown in the original bill. If any such payments were made to the said Adam L. Henderson, as attorney for respondent, as alleged in the cross-bill (which payments respondent does not admit were in fact made), such payments were made wholly at the risk of the said complainant, since respondent here and now, in the most emphatic manner, denies that said Adam L. Henderson ever had authority, express or implied, from respondent to act as his agent or attorney in connection with this contract or in any other matter. And respondent further denies that he ever received any of said alleged payments, or any portion thereof, from or through the said Adam L. Henderson, or any other person.

And having fully answered, respondent prays to be dismissed from the proceedings on said cross-bill with his reasonable costs about his defense in this behalf expended.

LEMON & HERBERT,

for respondent in Cross-Bill.

To this answer complainant in the cross bill files a *general replication*. See form *supra*.

The Testimony.

[The whole case, on bill and cross-bill, and the several defensive pleadings, is now ready for the taking of testimony. A careful study of the pleadings will indicate what the issues are, namely, (1) *Has the plaintiff a living wife*, who is entitled to dower in the property in controversy? (2) *What payments has the defendant made to the plaintiff*, or to his alleged attorney, under the contract, and what is the balance due?

The questions of (1) *attorney's fees*; (2) *necessity of filing a conveyance* with the bill; (3) *compelling defendant to accept*

indemnity against the contingent right of dower in the alleged wife of plaintiff; (4) *the right of defendant to a rescission*, if the alleged wife of plaintiff is alive; and (5) *the statute of limitations*—have all been settled by the decision of the court on the several objections to pleadings in the form of (a) demurrer to the bill, (b) plea set down for argument and (c) demurrer to cross-bill.

The evidence to be taken, therefore, will be confined to the two issues of fact recited above.]

DEPOSITIONS.

Kendrick

v. On Original Bill.

Quinby

and

Quinby

v. On Cross-Bill.

Kendrick

The depositions of A, B, C and others taken, in pursuance of the notice hereto attached, before me, Howard Winston, a Notary Public in and for the county of Albemarle, in the state of Virginia, on the 14th day of November, 1915, at my office in the Administration Building, University of Virginia, between the hours of 9 A. M. and 6 P. M., to be read as evidence in behalf of the plaintiff in the original bill, in a certain suit in chancery depending in the circuit court of Albemarle county, under the style of *Kendrick v. Quinby*, on original bill, and *Quinby v. Kendrick*, on cross-bill.

Present:

John R. Lemon, for plaintiff.*R. C. Appleby*, for defendant.

The witnesses whose several depositions follow, being duly sworn to speak the truth, the whole truth and nothing but the truth, depose and say:

First witness: *James Aday*.

1st question by plaintiff's counsel: Please state your age, residence and occupation.

Answer: James Aday—Preston Heights, University, Va.—Law student.

2nd question: Please state whether you know the plaintiff in this suit, how long you have known him, and what your relations with him have been and are.

Answer: I do. I have known him intimately for four years, and our relations have been quite close and friendly, etc., etc.

Cross-examination by defendant's counsel.

1st Cross-question: Please say whether, etc., etc., etc.

Re-examination by counsel for plaintiff.

1st question: In your answer to Mr. Appleby's 14th cross question you say, etc., etc. Please explain precisely what you mean by that answer. Etc., etc., etc.

And further the deponent saith not.

(Signed) JAMES ADAY.

Second witness: *Benj. Brown.*

[Examined in chief—cross-examined and re-examined, and deposition signed, as in the case of the first witness.

If there are other witnesses to be examined at the same sitting, their depositions follow. When the depositions at that sitting are closed, the notary attaches a certificate substantially in the following form:]

I, Howard Winston, a notary public in and for the county of Albemarle in the state of Virginia, do certify that the foregoing depositions of James Aday, Benjamin Brown, etc., etc., were duly taken, sworn to and subscribed before me at the time and place and for the purpose in the caption mentioned.

Given under my hand [and seal¹] this the 14th day of November, 1915.

(Signed) Howard Winston,

Notary Public.

My commission expires March 3, 1918.

1. The use of the notary's seal is almost universal, but it is not required in Virginia where the attested document is taken and is to be used within the state.

DECREE: *Dismissing cross-bill, and order of reference to a master.*
Note for decree, March Term 1916.

Kendrick

v. On Original Bill.

Quinby

and

Quinby

v. On Cross-Bill.

Kendrick

This cause came on this day to be again heard on the papers formerly read, on the answer of the defendant Peter Quinby, to the original bill, with general replication thereto, on the cross-bill of the said defendant Peter Quinby, filed by leave of court, and on the exhibits therewith filed, on the answer of the plaintiff to said cross-bill, with general replication thereto, and on the depositions of witnesses for both plaintiff and defendant, and was argued by counsel.

On consideration whereof, the court being satisfied from the testimony that the plaintiff is not the husband of a living wife, and that, in consequence, the title to the property in the bill and proceedings mentioned is not encumbered by the contingent right of dower as alleged in the answer and cross-bill of the defendant, but that, on the contrary, the plaintiff is able and willing to perform his contract by conveying a perfect title to the defendant, it is adjudged, ordered and decreed that the cross-bill of the defendant be and the same is hereby dismissed at the costs of the said defendant.

And the court being unable at this time to ascertain from the testimony what amounts the defendant has paid to the plaintiff on said contract of sale and purchase, and what amount actually remains unpaid, the court doth adjudge, order and decree that this cause be referred to one of the masters of this court with directions to take, state and settle an account showing what the said balance due under said contract is, with the date or dates from which the same, or the several parts thereof, bear interest.

And said 'master will report to the next term of this court how he has executed this decree,' in order that the court may make such further order in the premises as it may be advised.

MASTER'S REPORT.

Kendrick

v.

Quinby.

To the Honorable John W. Fishburne, Judge of the circuit court of Albemarle county:

The undersigned master begs leave respectfully to report that in accordance with the directions of a decree of your honor's court, entered at the March term, 1916, in the above entitled cause, and after giving due notice to the parties thereto, the undersigned proceeded on the first day of April, 1916, to take said account. Both parties appeared in person and by counsel, and much testimony, both in the form of depositions of witnesses and of documents, was introduced on such hearing. All of the testimony introduced before the master is herewith returned for the inspection of the court, in case this shall seem desirable. The proceedings were adjourned from time to time to suit the convenience of the parties.

The conclusion of the undersigned is herewith submitted in the form of a statement marked "Master's Exhibit number 1." From this statement it appears that the defendant made sundry payments from time to time under the contract in question, some of which payments were made to the plaintiff personally, but most of them were made to one Adam L. Henderson, as attorney for the plaintiff. The plaintiff, in his pleadings and by his evidence before the master, denied the authority of the said attorney to represent him in the matter, but the master is of opinion that the defendant has established the contrary by a preponderance of testimony, and the account has been made up on the basis of the validity of all payments so made to said Henderson in that behalf.

The statement referred to shows a balance of principal due the plaintiff of \$2,375, with interest thereon from July 17, 1911,

until paid, and the master recommends a decree for that amount in the plaintiff's favor.

Respectfully submitted,

W. R. SEWELL,
Master.

Master's fee:

47 hours at \$1.—\$47.

Paid by plaintiff.

W. R. S.

PLAINTIFF'S EXCEPTIONS TO REPORT:

The plaintiff by counsel excepts to the foregoing report of W. R. Sewell, master, and for ground of exception asserts that the finding of the master that the said Henderson was in fact plaintiff's attorney, and authorized to receive payments from the defendant on the plaintiff's behalf, is based on no valid testimony in the cause, but rests chiefly on hearsay testimony, to which the plaintiff duly excepted when it was offered by the defendant, as will appear by reference to the depositions filed with the said report. The plaintiff makes special reference to the depositions of P, Q, R and S, filed with the master's report, as being the only testimony offered by defendant to establish said Henderson's authority, none of which depositions, nor all combined, would even tend to prove such authority, if the hearsay and incompetent testimony therein were excluded.

Respectfully submitted,

LEMON & HERBERT,
for Complainant.

DECREE: *Sustaining exceptions to master's report, and ordering payment by defendant.*

Note for decree, June term, 1916.

Kendrick This cause came on this day to be again heard on
v. the papers formerly read, and on the report of W. R.
Quinby. Sewell, master, filed on the 7th day of May, 1916,
 and on the plaintiff's exceptions to said report,
and was argued by counsel.

On consideration whereof, the court being satisfied from an

examination of the said report and of the testimony excepted to, that the plaintiff's exceptions are well taken, doth sustain the said exceptions, and doth reject the findings of the master in the particulars following, to-wit: That is to say, the court finds, and so adjudges, that the defendant is not entitled to credit for any of the payments shown by the master's statement to have been made to Adam L. Henderson, alleged attorney for plaintiff, but is entitled to credit only for such payments as are shown by said statement to have been made to the plaintiff personally. And it appearing that the rejected credits may be ascertained by a mere inspection of the said report and statement, and that the balance then due the plaintiff may be ascertained by a statement made up at the bar of the court by counsel, under directions of the court, the court deems it unnecessary to refer the said report back to the master for further proceedings.

Adopting, therefore, the statement so made up at the bar of the court, as exhibiting the true state of the account between the parties, and which is ordered to be filed with the papers in this cause, and it appearing from such statement that the balance so due is represented by what follows, the court doth adjudge, order and decree that the defendant do, within 60 days from the entry of this decree, pay to the plaintiff the sum of \$3,650, with legal interest thereon from the 13th day of August, 1911, until paid, together with the costs of this suit.

The court doth further adjudge, order and decree that before demanding payment of the sum hereinbefore decreed, the plaintiff shall file with the clerk of this court, as a part of the record in this cause, a proper deed of conveyance, properly executed, acknowledged and certified, conveying the property in the bill and proceedings mentioned to the defendant, or to such person as he may, in writing, filed with the papers in this cause, direct—such conveyance to contain the usual covenants of warranty, and to be delivered by the clerk to the defendant, upon written acknowledgment of the plaintiff, or his counsel, that the defendant has fully satisfied this decree.

And the court doth retain the cause for such further proceedings as may be necessary, in case the defendant shall fail or refuse to obey the mandate of this decree.

Notes on the foregoing decree.

[1. If the defendant perform the decree, he receives his conveyance, and the plaintiff his purchase money, so that there is no need of further continuing the cause on the docket. In which case, on motion of the plaintiff, an order is entered that "the objects of this suit having been accomplished it is ordered to be stricken from the docket."

2. If the decree be not performed, the plaintiff will ask for a decree subjecting the property to his vendor's (legal) lien, as set out in the bill—in which case there may be the following further proceedings—the precise proceedings depending somewhat on circumstances:

1. Decree appointing a special commissioner to make sale of the property, on terms prescribed in the decree.
2. Sale by the commissioner.
3. Report of sale, by the commissioner to the court.
4. Confirmation of the sale by the court—or rejection and order for a re-sale.
5. Order to the commissioner, or the general receiver, or a specially appointed receiver,¹ to collect the purchase money, as the installments fall due.
6. Reports of the commissioner or receiver, from time to time, showing the amount of his collections.
7. Orders, from time to time, directing the commissioner or receiver to pay over to plaintiff such balance as he has in his hands, as a credit on plaintiff's debt.
8. After the purchase money is paid in full by the purchaser at the judicial sale, an order is made appointing a special master (or commissioner) to convey the title to the purchaser.
9. After plaintiff's balance is all paid, and the costs provided for, an order is entered directing the net balance to be paid over to the defendant.
10. Filing of receiver's final report—its confirmation by the court, and an order dismissing the cause from the docket.]

1. Va. Code § 3401.

OTHER FORMS IN EQUITY.

[Subjoined are a few other familiar forms used in the equity practice, with which the young practitioner should cultivate a close and intimate acquaintance.]

AFFIDAVITS.

(1) *Virginia Form.*¹

Virginia,

County of Albemarle, to-wit:

I, Howard Winston, a Notary Public (or a justice of the peace, or a commissioner in chancery) for the State and county aforesaid do certify that Peter Quinby whose name is signed to the foregoing answer, this day made oath before me, in my said county, that the matters and things therein stated as of his own knowledge are true, and those stated as on the information of others he believes to be true.

Given under my hand this the 17th day of April, 1916.

(Signed) HOWARD WINSTON.

My commission expires March 3, 1918.

(2) *The more usual form of Affidavit in other States.*

Virginia,

County of Albemarle, to-wit:

Peter Quinby being duly sworn [on the Holy Evangely of Almighty God] deposes and says that the matters and things in the foregoing answer stated as of his own knowledge, are true, and those stated as on information and belief he believes to be true.

(Signed) PETER QUINBY.

Sworn to and subscribed before me, by the affiant, Peter

1: This form of affidavit, practically universal in Virginia, differs from that prevailing generally in other states in the following particulars: (1) It is wholly the language of the notary; (2) It is not signed by the affiant; and (3) the notarial seal is not affixed.

Quinby, who is well known to me, this the 17th day of April, Anno Domini, 1916.

(Signed) HOWARD WINSTON,
(OFFICIAL SEAL) *Notary Public.*
My commission expires March 3, 1918.

PRELIMINARY INJUNCTION ORDER.

On the motion of the plaintiff, an injunction is awarded against the defendant, the Chesapeake and Ohio Railway Company, restraining and prohibiting the said defendant, its agents and servants, from entering, or in any wise trespassing upon or injuring, the lot of ground in the bill mentioned, until the further order of this court.

But the plaintiff shall not have the benefit of this order (or this order shall not become effective) until the plaintiff, or some one for him shall have entered into bond, before the clerk of this court, with good security to be approved by said clerk in the penalty of five hundred dollars (\$500.) conditioned to answer all costs and damages which may be awarded against him in case this injunction shall be dissolved.

(Signed) JOHN W. FISHBURNE, *Judge.*
To the Clerk of the Circuit Court of Albemarle county.

RULE TO SHOW CAUSE.

1. *On petition filed.*

On the motion of Hiram Q. Abernathy, he hath leave to file his petition in this cause, which is accordingly done. And on like motion a rule is awarded against Aaron Applegarth and Amelia Applegarth, his wife, defendants named in the said petition, to appear here on the first day of the April term of this court next, to show cause if any they have or can show why the prayer of the said petition shall not be granted.

2. *On contempt charge.*

It being represented to the court by affidavits filed by the plaintiff in this cause that the defendant, the Chesapeake & Ohio Railway Company, and its chief engineer, Robert C. Calloway,

are in contempt of this court in having violated the injunction heretofore awarded the plaintiff in this cause, enjoining and restraining the said defendant and its agents and servants from entering or otherwise trespassing upon or injuring the property of the plaintiff in the bill and proceedings mentioned, on the motion of the plaintiff a rule is awarded against the said defendant, the Chesapeake and Ohio Railway Company, and the said Robert C. Calloway to appear here tomorrow, the 17th of June, 1916, to show cause if any they have or can show why they shall not be attached or otherwise proceeded against according to law, for their said contempt.

APPENDIX II.

The New Federal Equity Rules of 1912

RULE 1.

DISTRICT COURT ALWAYS OPEN FOR CERTAIN PURPOSES—ORDERS AT CHAMBERS.

The district courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein.

Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

2.

CLERK'S OFFICE ALWAYS OPEN, EXCEPT, ETC.

The clerk's office shall be open during business hours on all days, except Sundays and legal holidays, and the clerk shall be in attendance for the purpose of receiving and disposing of all motions, rules, orders and other proceedings which are grantable of course.

3.

BOOKS KEPT BY CLERK AND ENTRIES THEREIN.

The clerk shall keep a book known as "Equity Docket," in which he shall enter each suit, with a file number corresponding to the folio in the book. All papers and orders filed with the clerk in the suit, all process issued and returns made thereon, and all appearances shall be noted briefly and chronologically in this book on the folio assigned to the suit and shall be marked with its file number.

The clerk shall also keep a book entitled "Order Book," in which shall be entered at length, in the order of their making, all orders

made or passed by him as of course and also all orders made or passed by the judge in chambers.

He shall also keep an "Equity Journal," in which shall be entered all orders, decrees and proceedings of the court in equity causes in term time.

Separate and suitable indices of the Equity Docket, Order Book and Equity Journal shall be kept by the clerk under the direction of the court.

4.

NOTICE OF ORDERS.

Neither the noting of an order in the Equity Docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor and a note of such mailing shall be made in the Equity Docket, which shall be taken as sufficient proof of due notice of the order.

5.

MOTIONS GRANTABLE OF COURSE BY CLERK.

All motions and applications in the clerk's office for the issuing of mesne process or final process to enforce and execute decrees; for taking bills *pro confesso*; and for other proceedings in the clerk's office which do not require any allowance or order of the court or of a judge, shall be deemed motions and applications grantable of course by the clerk; but the same may be suspended, or altered, or rescinded by the judge upon special cause shown.

6.

MOTION DAY.

Each district court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of causes. If the public interest permits, the senior circuit judge of the circuit may dispense with the motion day during not to exceed two months in the year in any district.

7.

PROCESS, MESNE AND FINAL.

The process of subpœna shall constitute the proper mesne proc-

ess in all suits in equity, in the first instance, to require the defendant to appear and answer the bill; and, unless otherwise provided in these rules or specially ordered by the court, a writ of attachment, and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

8.

ENFORCEMENT OF FINAL DECREES.

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the district court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found a writ of sequestration shall issue against his estate, upon the return of *non est inventus*, to compel obedience to the decree. If a mandatory order, injunction or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides, or instead of, proceedings against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him.

9.

WRIT OF ASSISTANCE.

When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

10.

DECREE FOR DEFICIENCY IN FORECLOSURES, ETC.

In suits for the foreclosure of mortgages, or the enforcement of other liens, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in rule 8 when the decree is solely for the payment of money.

11.

PROCESS IN BEHALF OF AND AGAINST PERSONS NOT PARTIES.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, may enforce obedience to such order by the same process as if he were a party; and every person, not being a party, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party.

12.

ISSUE OF SUBPŒNA—TIME FOR ANSWER.

Whenever a bill is filed, and not before, the clerk shall issue the process of subpœna thereon, as of course, upon the application of the plaintiff, which shall contain the names of the parties and be returnable into the clerk's office twenty days from the issuing thereof. At the bottom of the subpœna shall be placed a memorandum, that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, or a joint subpœna against all the defendants.

13.

MANNER OF SERVING SUBPŒNA.

The service of all subpœnas shall be by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family.

14.

ALIAS SUBPŒNA.

Whenever any subpœna shall be returned not executed as to any

defendant, the plaintiff shall be entitled to other subpoenas against such defendant, until due service is made.

15.

PROCESS, BY WHOM SERVED.

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court or judge for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

16.

DEFENDANT TO ANSWER—DEFAULT—DECREE PRO CONFESSO.

It shall be the duty of the defendant, unless the time shall be enlarged, for cause shown, by a judge of the court, to file his answer or other defense to the bill in the clerk's office within the time named in the subpoena as required by rule 12. In default thereof the plaintiff may, at his election, take an order as of course that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*.

17.

DECREE PRO CONFESSO TO BE FOLLOWED BY FINAL DECREE—SETTING ASIDE DEFAULT.

When the bill is taken *pro confesso* the court may proceed to a final decree at any time after the expiration of thirty days after the entry of the order *pro confesso*, and such decree shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit. No such motion shall be granted, unless upon the payment of the costs of the plaintiff up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

18.

PLEADING—TECHNICAL FORMS ABROGATED.

Unless otherwise prescribed by statute or these rules the technical forms of pleadings in equity are abolished.

19.

AMENDMENTS GENERALLY.

The court may at any time, in furtherance of justice, upon such

terms as may be just, permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

20. .

**FURTHER AND PARTICULAR STATEMENT IN PLEADING
MAY BE REQUIRED.**

A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just.

21.

SCANDAL AND IMPERTINENCE.

The right to except to bills, answers, and other proceedings for scandal or impertinence shall not obtain, but the court may, upon motion or its own initiative, order any redundant, impertinent or scandalous matter stricken out, upon such terms as the court shall think fit.

22.

**ACTION AT LAW ERRONEOUSLY BEGUN AS SUIT IN
EQUITY—TRANSFER.**

If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential.

23.

**MATTERS ORDINARILY DETERMINABLE AT LAW, WHEN
ARISING IN SUIT IN EQUITY TO BE DISPOSED OF
THEREIN.**

If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court.

24.

SIGNATURE OF COUNSEL.

Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so

signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.

25.

BILL OF COMPLAINT—CONTENTS.

Hereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption:

First, the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. If any party be under any disability that fact shall be stated.

Second, a short and plain statement of the grounds upon which the court's jurisdiction depends.

Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.

Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties—as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction.

Fifth, a statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms. If special relief pending the suit be desired the bill should be verified by the oath of the plaintiff, or someone having knowledge of the facts upon which such relief is asked.

26.

JOINDER OF CAUSES OF ACTION.

The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there are more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials.

27.

STOCKHOLDER'S BILL.

Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which

may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort.

28.

AMENDMENT OF BILL AS OF COURSE.

The plaintiff may, as of course, amend his bill before the defendant has responded thereto, but if such amendment be filed after any copy has issued from the clerk's office, the plaintiff at his own cost shall furnish to the solicitor of record of each opposing party a copy of the bill as amended, unless otherwise ordered by the court or judge.

After pleading filed by any defendant, plaintiff may amend only by consent of the defendant or leave of the court or judge.

29.

DEFENSES—HOW PRESENTED.

Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, non-joinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered.

30.

ANSWER—CONTENTS—COUNTER-CLAIM.

The defendant in his answer shall in short and simple terms set

out his defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Averments other than of value or amount of damage, if not denied, shall be deemed confessed, except as against an infant, lunatic or other person *non compos* and not under guardianship, but the answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense.

The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims.

31.

REPLY—WHEN REQUIRED—WHEN CAUSE AT ISSUE.

Unless the answer assert a set-off or counter-claim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the plaintiff. If the answer include a set-off or counter-claim, the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counter-claim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof, and ten days shall be accorded to such defendants for filing a reply. In default of a reply, a decree *pro confesso* on the counter-claim may be entered as in default of an answer to the bill.

32.

ANSWER TO AMENDED BILL.

In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or it is otherwise ordered by

a judge of the court; and upon a default, the like proceedings may be had as upon an omission to put in an answer.

33.

TESTING SUFFICIENCY OF DEFENSE.

Exceptions for insufficiency of an answer are abolished. But if an answer set up an affirmative defense, set-off or counter-claim, the plaintiff may, upon five days' notice, or such further time as the court may allow test the sufficiency of the same by motion to strike out. If found insufficient but amendable, the court may allow an amendment upon terms, or strike out the matter.

34.

SUPPLEMENTAL PLEADING.

Upon application of either party the court or judge may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent court rendered after the commencement of the suit, determining the matters in controversy or a part thereof.

35.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS—FORM.

It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

36.

OFFICERS BEFORE WHOM PLEADINGS VERIFIED.

Every pleading which is required to be sworn to by statute, or these rules, may be verified before any justice or judge of any court of the United States, or of any State or Territory, or of the District of Columbia, or any clerk of any court of the United States, or of any Territory, or of the District of Columbia, or any notary public.

37.

PARTIES GENERALLY—INTERVENTION.

Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly author-

ized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when anyone refuses to join, he may for such reason be made a defendant.

Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.

38.

REPRESENTATIVES OF CLASS.

When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

39.

ABSENCE OF PERSONS WHO WOULD BE PROPER PARTIES.

In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, can not be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

40.

NOMINAL PARTIES.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him to do so by the prayer; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer

he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

41.

SUIT TO EXECUTE TRUSTS OF WILL—HEIR AS PARTY.

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.

42.

JOINT AND SEVERAL DEMANDS.

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

43.

DEFECT OF PARTIES—RESISTING OBJECTION.

Where the defendant shall by his answer suggest that the bill of complaint is defective for want of parties, the plaintiff may, within fourteen days after answer filed, set down the cause for argument as a motion upon that objection only; and where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order to amend his bill by adding parties; but the court shall be at liberty to dismiss the bill, or to allow an amendment on such terms as justice may require.

44.

DEFECT OF PARTIES—TARDY OBJECTION.

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by motion or answer taken the objection and therein specified by name or description the parties to whom the objection applies, the court shall be at liberty to make a decree saving the rights of the absent parties.

45.

DEATH OF PARTY—REVIVOR.

In the event of the death of either party the court may, in a

proper case, upon motion, order the suit to be revived by the substitution of the proper parties. If the successors or representatives of the deceased party fail to make such application within a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion, may make the necessary orders for notice to the parties to be substituted and for the filing of such pleadings or amendments as may be necessary.

46.

**TRIAL—TESTIMONY USUALLY TAKEN IN OPEN COURT—
RULINGS ON OBJECTIONS TO EVIDENCE.**

In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules. The court shall pass upon the admissibility of all evidence offered as in actions at law. When evidence is offered and excluded, and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling, and the exception. If the appellate court shall be for opinion that the evidence should have been admitted, it shall not reverse the decree unless it be clearly of opinion that material prejudice will result from an affirmance, in which event it shall direct such further steps as justice may require.

47.

**DEPOSITIONS—TO BE TAKEN IN EXCEPTIONAL
INSTANCES.**

The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses, to be used before the court or upon a reference to a master, to be taken before an examiner or other named officer, upon the notice and terms specified in the order. All depositions taken under a statute, or under any such order of the court, shall be taken and filed as follows, unless otherwise ordered by the court or judge for good cause shown: Those of the plaintiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions; and rebutting depositions by either party within twenty days after the time for taking original depositions expires.

48.

TESTIMONY OF EXPERT WITNESSES IN PATENT AND TRADE-MARK CASES.

In a case involving the validity or scope of a patent or trademark, the District Court may, upon petition, order that the testimony in chief of expert witnesses, whose testimony is directed to matters of opinion, be set forth in affidavits and filed as follows: Those of the plaintiff within forty days after the cause is at issue; those of the defendant within twenty days after plaintiff's time has expired; and rebutting affidavits within fifteen days after the expiration of the time for filing original affidavits. Should the opposite party desire the production of any affiant for cross-examination, the court or judge shall, on motion, direct that said cross-examination and any re-examination take place before the court upon the trial, and unless the affiant is produced and submits to cross-examination in compliance with such direction, his affidavit shall not be used as evidence in the cause.

49.

EVIDENCE TAKEN BEFORE EXAMINERS, ETC.

All evidence offered before an examiner or like officer, together with any objections, shall be saved and returned into the court. Depositions, whether upon oral examination before an examiner or like officer or otherwise, shall be taken upon questions and answers reduced to writing, or in the form of narrative, and the witness shall be subject to cross and re-examination.

50.

STENOGRAPHER—APPOINTMENT—FEES.

When deemed necessary by the court or officer taking testimony, a stenographer may be appointed who shall take down testimony in shorthand, and, if required, transcribe the same. His fee shall be fixed by the court and taxed ultimately as costs. The expense of taking a deposition, or the cost of a transcript, shall be advanced by the party calling the witness or ordering the transcript.

51.

EVIDENCE TAKEN BEFORE EXAMINERS, ETC.

Objections to the evidence, before an examiner or like officer, shall be in short form, stating the grounds of objection relied upon, but no transcript filed by such officer shall include argument or debate. The testimony of each witness, after being reduced to writing, shall be read over to or by him, and shall be signed by him in the presence of the officer; provided, that if the witness shall refuse to sign

his deposition so taken, the officer shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal. Objection to any question or questions shall be noted by the officer upon the deposition, but he shall not have power to decide on the competency or materiality or relevancy of the questions. The court shall have power, and it shall be its duty, to deal with the costs of incompetent and immaterial or irrelevant depositions, or parts of them, as may be just.

52.

**ATTENDANCE OF WITNESSES BEFORE COMMISSIONER,
MASTER OR EXAMINER.**

Witnesses who live within the district, and whose testimony may be taken out of court by these rules, may be summoned to appear before a commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in, the court.

In case of refusal of witnesses to attend or be sworn or to answer any question put by the commissioner, master or examiner or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

53.

**NOTICE OF TAKING TESTIMONY BEFORE EX-
AMINER, ETC.**

Notice shall be given by the respective counsel or parties to the opposite counsel or parties of the time and place of examination before an examiner or like officer for such reasonable time as the court or officer may fix by order in each case.

54.

**DEPOSITIONS UNDER REV. STAT. §§ 863, 866, 867—CROSS-
EXAMINATION.**

After a cause is at issue, depositions may be taken as provided by

Sections 863, 865, 866 and 867, Revised Statutes. But if in any case no notice has been given the opposite party of the time and place of taking the deposition, he shall, upon application and notice, be entitled to have the witness examined orally before the court, or to a cross-examination before an examiner or like officer, or a new deposition taken with notice, as the court or judge under all the circumstances shall order.

55.

DEPOSITIONS DEEMED PUBLISHED WHEN FILED.

Upon the filing of any deposition or affidavit taken under these rules or any statute, it shall be deemed published, unless otherwise ordered by the court.

56.

ON EXPIRATION OF TIME FOR DEPOSITIONS, CASE GOES ON TRIAL CALENDAR.

After the time has elapsed for taking and filing depositions under these rules, the case shall be placed on the trial calendar. Thereafter no further testimony by deposition shall be taken except for some strong reason shown by affidavit. In every such application the reason why the testimony of the witness cannot be had orally on the trial, and why his deposition has not been before taken, shall be set forth, together with the testimony which it is expected the witness will give.

57.

CONTINUANCES.

After a cause shall be placed on the trial calendar it may be passed over to another day of the same term, by consent of counsel or order of the court, but shall not be continued beyond the term save in exceptional cases by order of the court upon good cause shown by affidavit and upon such terms as the court shall in its discretion impose. Continuances beyond the term by consent of the parties shall be allowed, on condition only that a stipulation be signed by counsel for all the parties and that all costs incurred therefor be paid. Thereupon an order shall be entered dropping the case from the trial calendar, subject to reinstatement within one year upon application to the court by either party, in which event it shall be heard at the earliest convenient day. If not so reinstated within the year, the suit shall be dismissed without prejudice to a new one.

58.

DISCOVERY—INTERROGATORIES—INSPECTION AND PRODUCTION OF DOCUMENTS—ADMISSION OF EXECUTION OR GENUINENESS.

The plaintiff at any time after filing the bill and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave of the court or judge, may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause, with a note at the foot thereof stating which of the interrogatories each of the parties is required to answer. But no party shall file more than one set of interrogatories to the same party without leave of the court or judge.

If any party to the cause is a public or private corporation, any opposite party may apply to the court or judge for an order allowing him to file interrogatories to be answered by any officer of the corporation, and an order may be made accordingly for the examination of such officer as may appear to be proper upon such interrogatories as the court or judge shall think fit.

Copies shall be filed for the use of the interrogated party, and shall be sent by the clerk to the respective solicitors of record, or to the last known address of the opposite party, if there be no record solicitor.

Interrogatories shall be answered, and the answers filed in the clerk's office, within fifteen days after they have been served, unless the time be enlarged by the court or judge. Each interrogatory shall be answered separately and fully and the answers shall be in writing, under oath, and signed by the party or corporate officer interrogated. Within ten days after the service of interrogatories, objections to them, or any of them, may be presented to the court or judge, with proof of notice of the purpose so to do, and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. In so far as the objections are sustained, answers shall not be required.

The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary. Any party failing or refusing to comply with such an order shall be liable to attachment, and shall also be liable, if a plaintiff, to have his bill dismissed, and if a defendant, to have his answer stricken out and be placed in the same situation as if he had failed to answer.

By a demand served ten days before the trial, either party may call on the other to admit in writing the execution or genuineness of any document, letter or writing, saving all just exceptions; and if such admission be not made within five days after such service, the costs of proving the document, letter or writing shall be paid by the party refusing or neglecting to make such admission, unless at the trial the court shall find that the refusal or neglect was reasonable.

59.

REFERENCE TO MASTER—EXCEPTIONAL, NOT USUAL.

Save in matters of account, a reference to a master shall be the exception, not the rule, and shall be made only upon a showing that some exceptional condition requires it. When such a reference is made, the party at whose instance or for whose benefit it is made shall cause the order of reference to be presented to the master for a hearing within twenty days succeeding the time when the reference was made, unless a longer time be specially granted by the court or judge; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

60.

PROCEEDINGS BEFORE MASTER.

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reason for any delay.

61.

MASTER'S REPORT—DOCUMENTS IDENTIFIED BUT NOT SET FORTH.

In the reports made by the master to the court, no part of any state of facts, account, charge, affidavit, deposition, examination, or

answer brought in or used before him shall be stated or recited. But such state of facts, account, charge, affidavit, deposition, examination, or answer shall be identified, and referred to, so as to inform the court what state of facts, account, charge, affidavit, deposition, examination, or answer were so brought in or used.

62.

POWERS OF MASTER.

The master shall regulate all the proceedings in every hearing before him, upon every reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, or by deposition, according to the acts of Congress or otherwise, as here provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

63.

FORM OF ACCOUNTS BEFORE MASTER.

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, as the master shall direct.

64.

FORMER DEPOSITIONS, ETC., MAY BE USED BEFORE MASTER.

All affidavits, depositions, and documents which have been previously made, read, or used in the court upon any proceeding in any cause or matter may be used before the master.

65.

CLAIMANTS BEFORE MASTER EXAMINABLE BY HIM.

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appeal to him to require. The evidence upon such examinations

shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.

66.

RETURN OF MASTER'S REPORT—EXCEPTIONS—HEARING.

The master, as soon as his report is ready, shall return the same into the clerk's office and the day of the return shall be entered by the clerk in the Equity Docket. The parties shall have twenty days from the time of the filing of the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed. If exceptions are filed, they shall stand for hearing before the court, if then in session, or, if not, at the next sitting held thereafter, by adjournment or otherwise.

67.

COSTS ON EXCEPTIONS TO MASTER'S REPORT.

In order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled, shall, for every exception overruled, pay five dollars costs to the other party, and for every exception allowed shall be entitled to the same costs.

68.

APPOINTMENT AND COMPENSATION OF MASTER.

The District Courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof concurring in the appointment), and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master shall be fixed by the district court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

69.

PETITION FOR REHEARING.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record,

shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Circuit Court of Appeals or the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

70.

SUITS BY OR AGAINST INCOMPETENTS.

Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable of suing for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court or judge may direct for the protection of infants and other persons.

71.

FORM OF DECREE.

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:" (Here insert the decree or order.)

72.

CORRECTION OF CLERICAL MISTAKES IN ORDERS AND DECREES.

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before the close of the term at which final decree is rendered, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

73.

PRELIMINARY INJUNCTIONS AND TEMPORARY RESTRAINING ORDERS.

No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly

appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office.

74.

INJUNCTION PENDING APPEAL.

When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or a judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending, modifying or restoring the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.

75.

RECORD ON APPEAL—REDUCTION AND PREPARATION.

In case of appeal:

(a) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a *præcipe* which shall indicate the portions of the record to be incorporated into the transcript on such appeal. Should the appellee or his solicitor desire additional portions of the record incorporated into the transcript, he shall file with the clerk of the court his *præcipe* also within ten days thereafter, unless the time shall be enlarged by the court or a judge thereof, indicating such additional portions of the record desired by him.

(b) The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all

parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his *præcipe* under paragraph (a) of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal.

(c) If any difference arise between the parties concerning directions as to the general contents of the record to be prepared on the appeal, such difference shall be submitted to the court or judge in conformity with the provisions of paragraph (b) of this rule, and shall be covered by the directions which the court or judge may give on the subject.

76.

RECORD ON APPEAL—REDUCTION AND PREPARATION— COSTS—CORRECTION OF OMISSIONS.

In preparing the transcript on an appeal, especial care shall be taken to avoid the inclusion of more than one copy of the same paper and to exclude the formal and immaterial parts of all exhibits, documents and other papers included therein; and for any infraction of this or any kindred rule the appellate court may withhold or impose costs as the circumstances of the case and the discouragement of like infractions in the future may require. Costs for such an infraction may be imposed upon offending solicitors as well as parties.

If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript.

77.

RECORD ON APPEAL—AGREED STATEMENT.

When the questions presented by an appeal can be determined by the appellate court without an examination of all the pleadings and evidence, the parties, with the approval of the District Court or the judge thereof, may prepare and sign a statement of the case showing how the questions arose and were decided in the District Court, and setting forth so much only of the facts alleged and proved, or sought to be proved, as is essential to a decision of such questions by the Appellate Court. Such statement, when filed in the office of the clerk of the District Court, shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the decree from which the appeal is taken, and, together with such decree, shall be copied and certified to the Appellate Court as the record on appeal.

78.

AFFIRMATION IN LIEU OF OATH.

Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

79.

ADDITIONAL RULES BY DISTRICT COURT.

With the concurrence of a majority of the circuit judges for the circuit, the District Courts may make any other and further rules and regulations for the practice, proceedings and process, *mesne* and final, in their respective districts, not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same.

80.

COMPUTATION OF TIME—SUNDAYS AND HOLIDAYS.

When the time prescribed by these rules for doing any act expires on a Sunday or legal holiday, such time shall extend to and include the next succeeding day that is not a Sunday or legal holiday.

81.

**THESE RULES EFFECTIVE FEBRUARY 1, 1913
—OLD RULES ABROGATED.**

These rules shall be in force on and after February 1, 1913, and shall govern all proceedings in cases then pending or thereafter

brought, save that where in any then pending cause an order has been made or act done which cannot be changed without doing substantial injustice, the court may give effect to such order or act to the extent necessary to avoid any such injustice.

All rules theretofore prescribed by the Supreme Court, regulating the practice in suits in equity, shall be abrogated when these rules take effect.

INDEX

[REFERENCES ARE TO SECTIONS.]

SECTIONS

ACCOUNT OF LIENS—see *Creditors' Bills*.

ADULTERY—see *Divorce Suits*.

AFFIDAVIT.

To bills, generally.....	103-104
To bill, in attachment proceedings.....	283
— in suit for sale of infants' lands.....	336
— for injunction	292
Use of, on motion to dissolve injunction.....	296
Form—see Appendix, p. 227.	

ALIMONY—see *Divorce Suits*.

AMENDED BILL.

In full	117-125
---------------	---------

ANCILLARY PROCEEDINGS. See *Injunctions; Receivers*.

Attachment in equity.....	281-283
Appointment of receivers.....	372

ANSWER.

In full	190-210
Nature of	190-191
As evidence for respondent.....	192-205
— in ordinary causes.....	192
— in hearing on bill and answer.....	196, 205
— to pure bill of discovery.....	197-200
— to bill for discovery and legal relief.....	201
— on motion to dissolve injunction.....	195n, 296
Waiver of oath.....	194-195
Exceptions to—office of.....	203
Objections to legal sufficiency—how taken.....	204-205
Allegations not answered.....	206
As cross-bill	132-133
Answer in Federal Courts.....	207-209
Amendment of	210
Form—see Appendix, pp. 212, 218.	

APPEALS.	SECTIONS
Record in a chancery suit.....	412
Bills of exception—unknown in equity.....	412
Agreed statement in lieu of record.....	413
Prerequisites of appeal—subject-matter.....	414
— stage of the cause.....	415
Time limit	416-417
APPELLATE JURISDICTION.	
Necessary subject-matter	414
Effect on, of consolidating causes.....	235
ASSISTANCE.	
Writ of	270
ATTACHMENT.	
Ancillary to equity suits.....	281-283
In contempt proceedings.....	271
BIDDINGS—see <i>Judicial Sales</i> .	
BILLS—see <i>Injunctions; Divorce; Creditors' Bills; Sale of Infants' Land; Partition</i> .	
Classification	10, 72-74
Original—in detail	76-115
Names of parties—use of initials.....	79-82
Stating the case.....	83
Anticipating matter in defense.....	85-86
Jurisdictional allegations	87-88
Waiver of answer under oath.....	90, 194-195
Prayer for relief—general and special.....	92-96
Taken <i>pro confesso</i> —when—effect.....	40a-40c
Not taken <i>pro confesso</i> , when.....	323
Signature of counsel.....	100-101
Affidavit to bill.....	102-103
Allegations of fact—not legal conclusions.....	105
Arguing the case in the bill.....	106
Recitation of evidence.....	106
Bill to enforce decree.....	278-279
Supplemental bill	116
Amended bill—generally	117-125
Bill in attachment proceedings.....	281-283
— for injunction	288-301
— for partition	302
— for divorce	326
— for sale of infants' lands.....	335
— creditors'	350
— to perpetuate testimony.....	108
— for discovery	109-113
— for discovery and legal relief.....	113-115
Form—see <i>Appendix</i> , p. 208.	

BILLS OF EXCEPTION.	SECTIONS
Unknown in equity practice.....	412
BILL OF REVIEW.	
In full	140-154a
Purpose	140
Grounds on which filed.....	141
Practice	142-147
Why only after final decree.....	148
Final decrees generally	149-154
Time limit	153
In Federal practice.....	154
Combined with injunction.....	154a
Frame of the bill.....	146
BILL OF REVIVOR.	
In general	139
BONDS—see <i>Injunctions; Judicial Sales; Receivers.</i>	
CLERK'S OFFICE.	
Proceedings in—generally	38-40e
Bill <i>pro confesso</i>	40a-40e
COMMISSIONERS—see <i>Masters in Chancery; Judicial Sales; Partition.</i>	
CONFLICT OF LAWS.	
Conveyance by foreign master.....	277
Exterritorial jurisdiction	15-19
Foreign receivers	405
CONSOLIDATION OF SUITS.	
In general	226-236
Effect on appellate jurisdiction.....	235
Hearing together—distinction	227-229
When proper—résumé	236
CONTEMPTS.	
Proceedings in	271
CONTINUANCES IN FEDERAL COURTS.	
Rule governing	238a
CO-RESPONDENT—see <i>Divorce Suits.</i>	
COUNSEL.	
Signature to pleadings.....	100-101
Stipulations between	237-238
CREDITORS' BILLS.	
Generally—in full	350-372
Distinctive feature	350-351
General creditors cannot maintain—exceptions.....	352-353

CREDITORS' BILLS—*Continued.*

SECTIONS

General creditors may assail fraudulent conveyances, by statute	354
Proper plaintiffs	355
General creditors' bill	355, 358
Parties defendant	356
Parties—by intervention	357
Order of reference	358, 366-371
— general effect	361
— effect on dominion of suit	362
— effect on other creditors' suits	363
— effect on statute of limitations	364
— necessity of	366-371
— advantage	367-369
Consolidation of	226-236, 365

CROSS-BILL.

In full	127-133
Purpose and characteristics	127
New matter—new parties	128
Dismissal of original bill—effect on cross-bill	129
Leave to file	130
Process and procedure	131
Answer as cross-bill	132-133
Abolished in Federal practice	133

DECREES.

Interlocutory—in breast of the court	148, 157
Final—effect	149
Final—what are	150-154
Final as to one party only	152
Correction of—review—rehearing	140-161
Correction by appeal	414
Enrollment—meaning	241-243
Enforcement—methods of	269-279
Infant showing cause against	348
Preparation of	240
Recording	241
Form—recitation of pleadings	245-246
Dismissal of cause from docket—effect	248
Sale under, after six months	265
Passing legal title, by statute, in partition	316
Cannot pass legal title, in absence of statute	275-277

DEMURRER.

Generally	162-174
Functions	162
To what pleadings, in equity	165

DEMURRER—*Continued.*

SECTIONS

Failure to demur—effect	163-164
For multifariousness	69
Sustained—effect	166
Objections properly raised by	167-169
Question of jurisdiction raised by	170
Statute of limitations	171-172
Statute of parol agreements	173
Abolished in the Federal practice	174a

DEPOSITIONS.

In general	217-222
Under commission—publication	217n
Notice—when dispensed with	217-217a
Exceptions to testimony	219
Time within which, must be taken	220-221
Federal courts—testimony <i>ore tenus</i> —exceptions	222
Divorce suits—depositions in	323

DISMISSAL OF CAUSE.

From docket—effect	248
With leave to re-instate	248
Voluntary—without prejudice	249
By agreement—"dismissed agreed"	250

DIVORCE SUITS.

In full	319-328
Equity jurisdiction	319-320
Jurisdiction—essentials in Virginia	321
Venue	322
Conduct of suit	323
Bill not taken for confessed	323
Heard independently of admissions	323
Service of process	323-324
Depositions—only before master	323
Summons by publication	324
Suit money	325
Alimony—temporary	325
— permanent	328
<i>Pendente lite</i> powers of court	325
Bill—necessary allegations	326
Adultery, how charged—name of paramour	327
Children—custody of	328

DOCKET.

Dismissal from—effect	248
-----------------------------	-----

ELECTION.

Between pending suits	189
-----------------------------	-----

ENFORCEMENT OF DECREES—see *Decrees*.

SECTIONS

ENROLLMENT.

Of decrees—significance 241-243

EQUITY RULES.

Federal—see *Appendix II*.ERRORS—CORRECTION OF—see *Bill of Review; Appeals*.

EXCEPTIONS.

To answer—office of..... 203

To testimony 219

To master's report..... 254

Bill of—unknown in equity..... 412

EXECUTION.

Writ of 273

FEDERAL EQUITY RULES—see *Appendix II*.FORMS—see *Appendix II*.Memorandum, or *præcipe*.*Subpæna*.

Original bill for specific performance.

Demurrer to bill.

Order sustaining demurrer in part, with leave to amend.

Plea of statute of limitations.

Order setting down plea for argument.

Order disallowing plea, and requiring answer.

Answer setting up defect of title, and part payment.

General replication to answer.

Cross-bill for rescission of contract.

Demurrer to cross-bill.

Order overruling demurrer and requiring answer.

Answer to cross-bill.

General replication to answer.

Depositions.

Order dismissing cross-bill, and reference to master.

Master's report.

Exceptions to master's report.

Order sustaining exceptions, with decree to plaintiff.

Affidavit—Virginia form.

— usual form.

Order for temporary injunction.

Rule to show cause.

FRAUDULENT CONVEYANCES.

Suits to avoid..... 352-354

GUARDIAN AD LITEM.

Generally 34, 59

HEARING CAUSES TOGETHER—see *Consolidation*. SECTIONS

INFANTS—see *Sale of Infants' Lands*.

Process against	34-35
Suits by and against.....	34, 58-59
Showing cause against decree, after age.....	348
Sale of infants' lands—in full.....	329-349

INITIALS.

Improper in pleading.....	80
---------------------------	----

INJUNCTIONS.

Venue	23-24
Suits for generally.....	288-301
Temporary—restraining orders	289
— notice	290-291
— affidavit	292
— jurisdiction to award.....	293
— bond	294
— service of order.....	295
— motion to dissolve.....	296
— effect of dissolution.....	297
— by appellate court judge.....	298
— against legal proceedings.....	299-301
— form—see <i>Appendix</i> .	

INTERVENTION.

By petition	134-137
-------------------	---------

ISSUE OUT OF CHANCERY.

When proper	223
Waiver by consent.....	224
Effect of verdict.....	225

JUDICIAL SALES.

In full	256-268
By whom made.....	256
Terms of sale.....	257
How made	258
Relations between court and bidder.....	259-259n
Master's report—exceptions	260
Confirmation of sale.....	260
Appreciation or depreciation in value, before confirmation..	261
Resale by purchaser.....	262
Opening biddings—upset bids.....	263
Sale six months after decree.....	349
Title of purchaser.....	264-265
Collection of purchase money.....	266
Default of purchaser—resale.....	267-268
Conveyance by master.....	276
— by foreign master.....	277

JURISDICTION.

SECTIONS

Potential and active.....	9-15
<i>In personam</i> and <i>in rem</i>	16-19
Allegations of	87-88
— in divorce suits.....	326
Compared with venue.....	25
Mistake in, as between law and equity court.....	14
By consent—waiving objection.....	12-13, 15, 25
Questioning, by demurrer.....	13, 170
Nature of, acquired by order of publication.....	18-19

LIENS, ACCOUNT OF—see *Creditors' Bills*.

LIMITATIONS STATUTE OF—see *Statute of limitations*.

LUNATICS—see *Infants; Sales of Lands of Persons under Disability*.

MASTERS IN CHANCERY. See *Order of Reference; Master's Report*.

Conveyances by 275-277

MASTER'S REPORT.

In full 252-255

Form of—see *Appendix*.

MEMORANDUM—see *Process*.

MULTIFARIOUSNESS.

In full 62-69

NAMES.

In pleading—initials improper..... 80

NAMING A PLEADING.

Error in 126, 158

NEXT FRIEND. See *Infants*.

Generally 58n

OPENING THE BIDDINGS—see *Judicial Sales*.

ORDERS—see *Decrees*.

ORDER OF PUBLICATION.

Jurisdiction acquired by..... 18-19

In divorce proceedings 324

In creditors' suits..... 252

PARAMOUR.

Naming in divorce suits..... 327

PAROL AGREEMENTS.

Statute, how pleaded..... 173

PARTIES.	SECTIONS
Parties generally	41-59
General rule	47
Proper and necessary parties.....	48
Proper parties plaintiff.....	50-51
Representation of parties.....	52-55
Infant and insane parties.....	58-59
Trustee as representing beneficiary.....	55
Parties in several characters.....	56
Defect of parties—objection—how made.....	57
PARTITION SUITS.	
In full	302-318a
Jurisdiction—venue	302-304
Parties	305-308
Leases and alienations by one co-tenant.....	308
Combining with other relief.....	309
Trying questions of legal title.....	310
Partition in kind—how made.....	311-312
Owely	313
Title—how made	314-316
Sale for partition.....	317-318
PENDING SUIT.	
Plea of	188
Election between pending suits.....	189
PETITION.	
In full	134-138
By whom filed.....	135
Leave to file.....	136
Process on	137
For rehearing	155
Form of rule to show cause against—see <i>Appendix</i> .	
PETITION TO REHEAR.	
In full	155-161
Contrasted with bill of review.....	156
Interlocutory decrees	157
No time limit	159
Frame of the petition.....	160
In the Federal practice.....	161
PLEA.	
In full	175-189
Purpose and uses.....	175
Duplicity in	176
Sufficiency—how tested—results	177-181
Issue on—how made—how tried.....	182
Issue found for defendant.....	183

PLEA—*Continued.*

SECTIONS

Issue found for plaintiff.....	184
Supported by answer.....	185
Defense by—optional	186
In the Federal practice.....	187
Pending suit—plea of—election.....	188-189
Statute of parol agreements.....	173
Statute of limitations—form—see <i>Appendix</i> .	

PLEADING.

Outline of, in equity.....	60
Error in naming a pleading.....	126, 158
By initials	80
Amendments generally	117-125
Sundry forms—see <i>Appendix</i> .	

PRAYERS OF BILL.

For general and special relief.....	92-96
For alternative relief.....	94
For process	97-98

PROCESS.

In full	27-37
The memorandum—form of.....	31
How served	32
Against infants and lunatics.....	34-35
Variance between writ and bill.....	37
Order of publication.....	18-19
Form of original—see <i>Appendix</i> .	
For enforcement of decrees—see <i>Decrees</i> .	

PRO CONFESSO.

Bill taken—effect	40a-40e
When bill not taken, on default.....	40e, 323

PUBLICATION—see *Order of Publication*.

RECEIVER.

In full	372-411
Office—nature of	372
Appointment—circumstances justifying	374-378
— special	379
— in vacation	380
— notice of application.....	381-382
— effect of	385-388
Bond	384
— retroactive effect	384
Title of	386, 409
— possessory	403, 409
— by assignment—by statute.....	405, 409

RECEIVER— <i>Continued.</i>	SECTIONS
<i>Res in custodia legis</i>	387-388
Illustrations of receivership.....	389
Powers and duties.....	390
Implied powers	391-392
Claims against—intervention	394
Suits against	393-399
— under statutory license.....	396-399
Judgments against	395, 398-399
<i>Descriptio personæ</i>	395n, 402, 409n
Suits by	400-404
— consent of court.....	400
— in what name.....	401
— when title in receiver.....	402
— on transactions with receiver.....	403
— foreign receiver	405, 407-408
Conflicting receivership	404
Conflict of laws—foreign receivers.....	405-408
Foreign receivers—jurisdiction over extritorial <i>res</i>	405
— suits by	405-408
Assignment to receiver—order directing.....	405, 407n, 409
Statutory receivers	409
Ancillary receivers	410
Certificates—receivers'	411
RECORD IN A CHANCERY SUIT.	
What constitutes	412
Agreed statement in lieu of record.....	413
REHEARING—see <i>Petition to Rehear.</i>	
RELIEF.	
Prayers for—general and special.....	92-96
— alternative	94
REPLICATION.	
In full	211-216
Special, obsolete	119, 212
General	212-214
— traverse only—new matter.....	212, 212n
— functions of	213-214
— practically negligible in Virginia.....	215
Abolished in Federal practice.....	216
REVIEW—see <i>Bill of Review.</i>	
REVIVOR—see <i>Bill of Revivor.</i>	
SALE OF LANDS OF PERSONS UNDER DISABILITY.	
In full	329-349
Equitable jurisdiction	329

SALE OF LANDS OF PERSONS UNDER DISABILITY—

<i>Continued.</i>	SECTIONS
Virginia statute	330-331
Purposes of sale	330
Nature of estate.....	331-331a
Procedure—in detail	332-344
Venue	333
Proper plaintiff	334
Bill—necessary allegations	335
— verification	336
Parties defendant	337
Infants as heirs of each other.....	338
Guardian <i>ad litem</i>	339
Answers	340
Depositions	341
Decree	342
Sale	343
Proceeds—disposition of	344
Mortgage—inadequate protection of mortgagee.....	344(n)
Interpretation of statute.....	345-346
Trust estates of infants—original equitable jurisdiction over.	346
Title of <i>bona fide</i> purchaser.....	347-349
Infant showing cause against decree.....	348
Sale six months after decree.....	349

SEQUESTRATION.

Writ of	272
---------------	-----

SPECIFIC PERFORMANCE.

Suit for—complete forms—see *Appendix I*.

STATUTE OF LIMITATIONS.

Setting up by demurrer.....	171-172
Form of plea—see <i>Appendix</i> .	

STATUTE OF PAROL AGREEMENTS.

Defense by demurrer—by plea.....	173
----------------------------------	-----

STIPULATIONS.

In general	237-238
------------------	---------

SUBPŒNA—see *Process*.SUMMONS—see *Process*.

SUPPLEMENTAL BILL.

Generally	116
-----------------	-----

TESTIMONY—see *Depositions; Issue out of Chancery*.

<i>Ore tenus</i> in federal courts.....	222
---	-----

TITLE.

Legal—decree as passing.....	275-277
------------------------------	---------

TRUSTEE.	SECTIONS
As representative of beneficiary.....	55
UPSET BIDS—see <i>Judicial Sales</i> .	
VACATION PROCEEDINGS.	
In Federal courts.....	236b
In Virginia courts	236c
VARIANCE.	
Between writ and bill.....	37
VENUE OF SUITS.	
In full	20-26
Injunction suits	23-24
Mistake in venue	25
Contrasted with jurisdiction.....	25
Divorce proceedings—see <i>Divorce Suits</i> .	
WRIT—see <i>Process</i> .	
Writ of assistance.....	270
— attachment	271
— sequestration	272
— execution	273

E. J. MARSHALL

